APPENDIX A

SUPREME COURT OF PENNSYLVANIA

Nos. 395 MAL 2001 & 439 MAL 2001

CITY OF CHESTER,

Respondent,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioner.

CROSS-PETITIONER: CITY OF CHESTER

October 5, 2001, Decided

NOTICE:

DECISION WITHOUT PUBLISHED OPINION

OPINION:

ORDER

PER CURIAM:

AND NOW, this 5th day of October 2001, the petition for allowance of appeal and the cross-petition for allowance of appeal are denied.

APPENDIX B

COMMONWEALTH COURT OF PENNSYLVANIA

No. 2212 C.D. 2000,
No. 2225 C.D. 2000,
No. 2359 C.D. 2000

CITY OF CHESTER,
Petitioner,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent;

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

PUBLIC UTILITY COMMISSION,
Respondent;

COUNTY OF DELAWARE,
Petitioner,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Respondent.

April 2, 2001, Argued
April 27, 2001, Decided
April 27, 2001, Filed

BEFORE: HONORABLE JOSEPH T. DOYLE, *President Judge*, HONORABLE DAN PELLEGRINI, *Judge*, HONORABLE WILLIAM J. LEDERER, *Senior Judge*.

OPINION

OPINION BY JUDGE PELLEGRINI

Before this Court are three consolidated petitions for review filed by the City of Chester (City), the County of Delaware (County) and Consolidated Rail Corporation (Conrail) from an order of the Pennsylvania Public Utility Commission (PUC) allocating costs to each of those parties for the repair and maintenance of the Lloyd Street Bridge.

This case involves the Lloyd Street Bridge (Bridge), a three-span structure carrying Lloyd Street over the tracks of National Railroad Passenger Corporation (Amtrak) in the City of Chester, Delaware County, Pennsylvania. The Bridge, which was built in 1899 by the Pennsylvania, Washington and Baltimore Railroad Company to carry Lloyd Street over the railroad right-of-way, is owned by Amtrak which acquired the line of railroad from the Penn Central Railroad Company through Conrail. State Routes 13 and 291 are state highways that feed into or lead off from Lloyd Street near the crossing. Lloyd Street is a city street in the City of Chester. On May 29, 1997, the PUC issued an order affirming the action of the City in posting a five-ton weight limit on the Bridge due to its deteriorating condition. Because no concerned party agreed to accept responsibility for maintaining the structure until it could be replaced, the PUC entered an order instituting an investigation upon its own motion to determine the condition, disposition and responsibility for maintenance of the Bridge.

Public hearings were held before an Administrative Law Judge (ALJ) to determine which party or parties were to be held responsible for repairing and maintaining the Bridge. At the hearings, representatives of Amtrak testified that approximately 54 Amtrak passenger trains operated daily on the line at speeds of up to 90 m.p.h., and Conrail operated approximately four freight trains per day at speeds up to

45 m.p.h., but normally they traveled at 10 m.p.h. Amtrak had maintenance responsibilities for the rail line and facilities located at the subject crossing under its agreement with Conrail. Conrail made payments to Amtrak for its use of the line, and additional payments to serve as compensation for a portion of the financial responsibility for liability that Amtrak agreed to assume under the agreement and were meant to represent Conrail's fair and equitable share of the cost to Amtrak for Conrail's operations on the line. Amtrak's representative testified that Amtrak had maintained the Bridge in the past by removing cross-bracing that was loose, repairing a stringer, affixing protective shields on the Bridge to protect Amtrak's overhead electrical wires, and performing repairs on the Bridge to prevent any structural portions of the Bridge from coming in contact with the catenary wires. Amtrak representatives stated that Amtrak did not agree to perform any work or assume any costs for the repair or replacement of the Bridge. It was Amtrak's position that it was exempt under federal law from contributing to the costs of repairs and maintenance because such costs constituted a tax or fee.

Representatives for the City testified that the City had been declared financially distressed pursuant to the Municipalities Financial Recovery Act,[1] and was currently operating under a recovery plan adopted pursuant to that Act's provisions. The City was the party responsible for pursuing Bridge Bill funding for reconstruction of the Bridge; however, no application had been made for federal or state funding in regard to the Bridge. The City had applied, though, to the Delaware County Planning Department for consideration for Bridge Bill funding to replace the Bridge. The City indicated that it benefited from the existence of the Bridge because it provided continuity to residential neighbors on both sides, provided a link between residential neighborhoods which

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[1] Act of July 10, 1987, P.L. 246, as amended, 53 P.S. §§ 11701.101—11701.501.

encouraged walking and bicycling, and made the street safe for both auto traffic and other users; however, it did not agree to perform any work or assume any costs for any repairs to the Bridge. The City argued that Amtrak should not be excused from contributing to the costs because they did not constitute a tax or fee. It further argued that it would be unreasonable to order the City to pay to maintain the Bridge because it was a distressed municipality.

Representatives for the Southeastern Pennsylvania Transportation Authority (SEPTA) testified that in response to federal court decisions in which SEPTA was found not liable for the costs of highway bridge maintenance,[2] a consent decree was entered into between the PUC and SEPTA wherein the PUC agreed to refrain from assessing it costs or responsibility for the construction, maintenance or repair of any highway bridge.[3] In addition, they pointed out that

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[2] *See Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission*, 826 F. Supp. 1506 (E.D. Pa. 1993) (SEPTA II), *affirmed per curiam*, 27 F.3d 558 (3rd Cir. 1994), *cert. denied*, 513 U.S. 928 (1994), and *Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission*, 802 F. Supp. 1273 (E.D. Pa. 1992) (SEPTA).

[3] Specifically, the consent decree provided in relevant part:

> 1. Under 49 U.S.C. §§ 24301(1) and 24501(g), the Commission is barred hereafter from assessing or continuing to assess upon SEPTA the cost or responsibility of or for design, construction, reconstruction, inspection, maintenance, removal of snow, ice, debris or graffiti, or repair ("Assessed Cost or Responsibility") of any Highway Bridge (further defined for this Consent Decree to also include all components, including without limitation, approaches, substructures and superstructures, highway decking, as well as railings, walls, fences and shielding of any kind, and stairways and ramps attached to the bridge (except where expressly accepted by SEPTA, either in writing to the Commission or on the record of a Commission proceeding, as a necessary part of an adjacent SEPTA-owned railroad station), and all lighting, drainage and highway signage. The term "Highway Bridge" shall not include

SEPTA had not performed any work at the subject crossing and did not agree to assume any future maintenance responsibilities for any part of the Bridge or its approaches. However, they admitted that SEPTA received a benefit from the crossing because having a separated-grade crossing was preferable to having an at-grade crossing. Representatives for the Pennsylvania Department of Transportation (PennDot), which had intervened in the matter, testified that PennDot did not receive any benefit from the Bridge. Specifically, they pointed out that any benefit inured to the City as the Lloyd Street crossing served as a collector street to City streets and to channel traffic into an arterial system that contained numerous roadways, only two of which were state highways. The primary purpose was to serve as a link for local neighborhood roads, and there was no evidence to conclude that Lloyd Street served as a necessary or vital link in the State highway system.

Conrail representatives testified that it had not performed any maintenance at the crossing but recognized that a benefit

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any railroad catenary attachment on a Highway Bridge, and shall not include any railroad facilities beneath a Highway Bridge.

2. SEPTA is relieved by the above-referenced federal law from any further obligations under all prior orders of the Commission (which is defined to also include its predecessor, the Pennsylvania Public Service Commission) assigning to SEPTA any Assessed Cost or Responsibility for any Highways Bridges at any above-grade crossings under the Commission's jurisdiction.

3. Unless permitted by subsequent amendment to, or repeal of, the above-referenced federal law, henceforth in all PUC above-grade crossing proceedings involving SEPTA railroad operations or SEPTA railroad rights-of-way, whether such proceedings are initiated by the Commission, SEPTA or by any other party, the Commission shall not assign to SEPTA, either on a temporary or permanent basis, any Assessed Cost or Responsibility in violation of SEPTA's statutory exemption with respect to Highway Bridges as set forth in paragraph no.1 of this Consent Decree.

existed because it prevented accidents involving motor vehicles and trains and reduced Conrail's liability for the same. Nonetheless, it argued that it should not be responsible for any costs for repairs or maintenance because it did not own any property on the rail line and only operated on the line pursuant to an operating agreement with Amtrak for which it paid Amtrak a fee to maintain the rail line and facilities.

The ALJ issued a Recommended Decision allocating to the City 75% of the costs to furnish all materials and perform all work necessary to maintain the substructure, superstructure and deck of the Bridge. The remaining 25% of the costs were divided among Conrail (15%), the County (5%) and PennDot (5%). The ALJ determined that Amtrak was exempted from contribution based on federal law, as was SEPTA based on the consent decree between SEPTA and the PUC in an unrelated matter.

The City, Conrail, PennDot and the County filed exceptions to the Recommended Decision. The PUC denied all of the exceptions and issued an order adopting the ALJ's Recommended Decision specifically providing that the City was to perform the following work and incur the following costs and expenses with regard to the Bridge:

> a. its initial cost and expense, furnish all materials and perform work necessary to maintain the substructure, superstructure and deck of the Lloyd Street rail-highway bridge crossing; all in a safe and satisfactory condition;
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> b. bear all of the remaining costs in furnishing material and performing work in accordance with ordering paragraph No. 7 hereof;
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> c. at its sole cost and expense, within 120 days from the date of entry of this Opinion and Order, perform an in-depth inspection of the entire structure and prepare and submit to our Bureau of Transportation and Safety,

and to all Parties hereto, a detailed in-depth inspection report which shall include, *inter alia*, a structural analysis of the bridge, its load-carrying capacity, what maintenance work the City of Chester has performed since the date of entry of the instant Opinion and Order, any changes in the condition of the bridge, which would affect the safety and well being of the traveling public, any specific recommendations as to what additional repairs and/or work should be performed and when same will be done, together with the status of its efforts to secure funding for bridge replacement. In addition to the foregoing, the City of Chester, at its sole cost and expense, shall perform an in-depth inspection of the structure at least once every year thereafter and shall submit to the Commission and the Parties a detailed in-depth inspection report setting forth therein the foregoing items of information;

d. at least fifteen (15) days prior to the start of each inspection and/or maintenance work, shall notify all interested Parties of the actual date on which each such inspection and/or work shall begin;

e. shall reimburse the Consolidated Rail Corporation for 85% of the costs incurred by Conrail in complying with Ordering Paragraph 13 [4] in the following proportions:

(a) City of Chester-75%

(b) The County of Delaware-5%

(c) Pennsylvania Department of Transportation-5%

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[4] Paragraph 13 provides: That the Consolidated Rail Corporation, at its initial cost and expense, provide watchmen and flagmen, if necessary, and any and all other protection necessary for all rail operations, including those of Conrail, Amtrak, and SEPTA, during performance of the maintenance and inspection work ordered in Ordering Paragraphs 7, 10 and 11 hereof.

The City, County and Conrail filed petitions for review [5] from that order that have been consolidated for appeal and are now before this Court.[6]

I.

Initially, the City, County and Conrail contend that the PUC erred in failing to allocate any costs to either Amtrak and/or SEPTA based on this Court's decision in *City of Philadelphia v. Pennsylvania Public Utility Commission*, 676 A.2d 1298 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 546 Pa. 657, 684 A.2d 558 (1996), *cert. denied*, 520 U.S. 1155 (1997). In City of Philadelphia, we held that both Amtrak and SEPTA were to be allocated costs associated with the repair and maintenance of certain bridges. As to Amtrak, we determined that although it was exempted from paying taxes imposed by a state agency pursuant to 49 U.S.C. § 23401(l), the allocation of costs did not constitute a tax. Regarding SEPTA, we found that the consent decree between the PUC and SEPTA did not bind this Court and deprived the parties that were not a party to that decree of their due process right to a full and fair hearing.

While acknowledging our decision, the PUC, nonetheless, explains that it chose to follow federal law instead which precludes allocating costs to Amtrak due to a permanent injunction, see *National Railroad Passenger Corporation v. Pennsylvania Public Utility Commission and Township of Tredyffrin*, 848 F.2d 436 (3d Cir. 1988), *cert. denied*, 488

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[5] Neither Amtrak nor SEPTA participated in the appeal. PennDot did not file an appeal.

[6] Our scope of review of the PUC's order is to determine whether constitutional rights were violated, whether errors of law were committed, or whether findings of fact are supported by substantial evidence. *Atglen-Susquehanna Trail, Inc. v. Pennsylvania Public Utility Commission*, 717 A.2d 581 (Pa. Cmwlth. 1998), *petition for allowance of appeal denied, 559 Pa. 695, 739 A.2d 1059 (1999).*

U.S. 893, 109 S. Ct. 231, 102 L. Ed. 2d 220 (1988), and the consent decree which precludes allocating costs to SEPTA. Regarding Amtrak's exclusion from any cost allocation and the PUC's reliance on federal law, we stated in City of Philadelphia that decisions of inferior federal courts are not binding on state courts. *Rader v. Pennsylvania Turnpike Commission*, 407 Pa. 609, 182 A.2d 199 (1962); *Lilley v. Johns-Manville Corporation*, 408 Pa. Super. 83, 596 A.2d 203 (Pa. Super. 1991), *petition for allowance of appeal denied*, 530 Pa. 644, 607 A.2d 254 (1992). Further, because state courts share responsibility for the application and enforcement of federal law, state courts may interpret federal law. *Howlett v. Rose*, 496 U.S. 356, 110 L. Ed. 2d 332, 110 S. Ct. 2430 (1990). "Although having concurrent rather than subordinate jurisdiction to decide the issue of federal law before us, we would nonetheless normally find the Third Circuit decision of great probity in interpreting the federal statute. However, that does not hold true when there is a circuit court split and our own analysis reveals that the Third Circuit is clearly wrong." *City of Philadelphia*, 676 A.2d at 1305 n.10. Because the PUC is a state administrative agency over which state courts have jurisdiction to determine what law it is to apply, including the interpretation of a federal law unless reversed by the United States Supreme Court, it was required to apply the holding in City of Philadelphia to this case.

As to holding that SEPTA is not responsible for its share of crossing costs because it had entered into a consent decree that in future cases it would not allocate any cost that was its fair share for maintaining a crossing, that consent decree cannot in any way bind anyone not a party to that agreement. None of the parties to the proceeding underlying this appeal were a party to the proceeding involving the consent decree, and by deferring to the consent decree, the PUC is violating the due process rights of those who were not a party to that

settlement.[7] Because the PUC is constrained to follow City of Philadelphia, this case is remanded to the PUC to conduct an additional hearing for the purpose of determining the allocation of costs associated with the Bridge that include Amtrak and SEPTA as well as all of the other parties involved.[8]

II.

The City also contends that the PUC erred by allocating to it 75% of the costs of maintaining and repairing the Bridge because it has been designated a financially distressed municipality under the Municipalities Financial Recovery Act and is fiscally unable to make the repairs and provide the maintenance as ordered. It explains that the City adopted a Municipal Recovery Plan pursuant to Section 245 of the Act, *53 P.S. § 11701.245*, under which it currently operates in order to operate on a balanced budget basis and provides the following excerpts from the Introduction to the Recovery Plan in support of the proposition that it is financially unable to contribute to the Bridge's repairs and maintenance:

> The City has operated for several years with a major imbalance between revenues and expenditures. Prac-

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[7] In City of Philadelphia, we noted:

> The PUC entry into a consent decree is problematic. The municipalities or private entities could make valid arguments that neither the federal courts or this court has considered. By entering into the consent decree agreeing not to allocate any costs to SEPTA, the PUC has prejudged those arguments and deprives those parties of their due process right to a full and fair hearing. Of course, we are not bound by the consent decree.

676 A.2d at 1307 n.16.

[8] The City, County and Conrail also contend that the PUC failed to consider relevant factors when determining the allocation of costs. As evidenced by the fact that we are remanding this case for an additional hearing so that the PUC can include Amtrak and SEPTA in the cost allocation, we obviously agree.

tically speaking the City has only limited ability to raise additional funds through taxation or borrowing, and current police and fire contracts restrict expenditure reductions. There are now few available alternatives for the City to pursue to achieve a balanced budget.

The City's ability to resolve its financial crisis outside of bankruptcy is absolutely dependent upon the aggressive implementation of this Recovery Plan in connection with the strong leadership of the Mayor and City Council. The Plan calls for the introduction of strong central administration of the City, professional management of day-to-day operations, strict and consistent budgetary, purchasing and other basic financial management controls and drastic reduction of operating expenditures.

* * *

If all of these steps are taken by the City, there is an opportunity for the City to climb out of fiscal chaos. Without their successful implementation, the City's future is bleak and its fiscal options few.

The PUC, however, argues that despite the City's financial status, which it contends is not controlling in determining the proper cost allocation, the City was the party responsible for pursuing the Bridge Bill funding for reconstruction of the Bridge. Additionally, it derives benefits from the existence of the Bridge because it provides continuity to residential neighbors on both sides and provides a link between residential neighborhoods and makes the crossing safe for traffic. We agree.

Initially, we should note that nothing in the Act provides that a municipality should get any consideration from paying bills due and owing or that it is otherwise exempt. The financial condition of a party and its ability to pay the fees associated with the cost of maintaining a crossing is not controlling or determinative for purposes of allocating

costs regardless of the party. *East Rockhill Township v. Pennsylvania Public Utility Commission*, 115 Pa. Commw. 228, 540 A.2d 600 (Pa. Cmwlth. 1988). Amtrak and SEPTA both have financial difficulties but that does not mean they should be excluded from the cost allocation for that reason. The costs associated with the maintenance and repair of the Bridge are costs of doing business and are no different than when the City buys materials or supplies for which its financial condition is not given any consideration, and the PUC was correct by not considering the City's financially distressed status when allocating costs.

III.

The County also contends that the PUC violated its due process rights by failing to provide it with notice of any of the hearings underlying this appeal, and, therefore, it cannot impose any obligation upon it for payment of costs associated with the Bridge. However, all that the record contains is a copy of a return receipt dated October 8, 1997, signed for by an agent of the County and does not provide us with enough information to make such a determination. Nonetheless, because we are remanding this case for an additional hearing to supplement the record, the County is on notice and can provide any evidence or call any witnesses that it believes the PUC should consider without sustaining any prejudice or due process violation. *See Katruska v. Bethlehem Center School District, Pa.*, 767 A.2d 1051 (filed 2001).

Accordingly, for all of the above-stated reasons, the case is remanded to the PUC for an additional hearing and to reapportion costs associated with repairing and maintaining the Lloyd Street Bridge crossing between the parties, including Amtrak and SEPTA.

DAN PELLEGRINI, JUDGE

ORDER

AND NOW, this 27th day of April, 2001, the order of the Pennsylvania Public Utility Commission dated September 1, 2000, is vacated, and the case is remanded to the Pennsylvania Public Utility Commission to hold an additional hearing and issue an adjudication to apportion costs for the repair and maintenance of the Bridge between the present parties, the National Railroad Passenger Corporation, and the Southeastern Pennsylvania Transportation Authority in accord-ance with the foregoing opinion within 120 days of this order. The PUC is directed to certify a supplemental record within 20 days after that order and the chief clerk is directed to establish a briefing schedule where any of the parties may set forth reasons why the PUC decision is erroneous. We retain jurisdiction.

DAN PELLEGRINI, JUDGE

APPENDIX C

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held September 7, 2001

Commissioners Present:

Glen R. Thomas, Chairman
Robert K. Bloom, Vice Chairman
Aaron Wilson, Jr., Abstaining
Terrance J. Fitzpatrick

I-00970070

Investigation upon the Commission's own motion to determine the conditions, disposition, and responsibility for maintenance of the existing crossing structure carrying Lloyd Street above-the-grade of the tracks of National Railroad Passenger Corporation in the City of Chester, Delaware County (AAR 550 958 N)

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration and disposition are the Exceptions filed by several Parties to the Recommended Decision on Remand (Recommended Decision) issued herein on August 7, 2001, by Administrative Law Judge (ALJ) Herbert Smolen.

On August 13, 2001, Norfolk Southern Railway Company (Norfolk Southern or NS) filed Exceptions. On August 14, 2001, the Commission's Bureau of Transportation and Safety (BTS) filed Exceptions. On August 15, 2001, the County of Delaware (County) filed Exceptions. On August 16, 2001, the Commonwealth of Pennsylvania, Department

of Transportation (PennDOT) filed Exceptions. Also on August 16, 2001, Southeastern Pennsylvania Transportation Authority (SEPTA) and the City of Chester (City) each filed Exceptions. On August 17, 2001, National Railroad Passenger Corporation (Amtrak) filed Exceptions.

Reply Exceptions were filed by the following Parties: the County, on August 21, 2001; PennDOT, on August 22, 2001; and by the City, on August 22, 2001.

History of Proceeding

By Order entered October 6, 1997, the Commission instituted an investigation to determine the condition and responsibility for maintenance of the crossing structure carrying Lloyd Street above-the-grade of the track of Amtrak in Chester, Delaware County, Pennsylvania.

A prior Commission Order entered on May 29, 1997, at Commission Docket No. M-00970921, affirmed the action of the City in posting the Lloyd Street Bridge for a five-ton weight limit. A Field Conference was held on July 14, 1997, whereat no concerned Party agreed to accept responsibility for maintaining the structure. Thereupon, the Commission instituted an investigation, and directed that PennDOT, the City, the County, Amtrak, SEPTA, Philadelphia Electric Company (PECO), Bell Atlantic-PA [1] (Verizon PA), Philadelphia Gas Works (PGW) and AT&T Communications be made Parties to the proceeding.

Subsequently, hearings were held on April 28, 1998, July 7, 1998, and November 13, 1998, whereat the BTS, Amtrak, SEPTA, PennDOT, Conrail and Chester presented testimony. The County did not appear. The record at that time consisted of 207 pages of transcript and various exhibits. Briefs and Reply Briefs were filed. The ALJ filed his

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[1] We note that this corporate entity is now known as Verizon Pennsylvania Inc. It will be referred to herein as Verizon PA.

Recommended Decision under date of April 29, 1999. That Recommended Decision was adopted by the Commission and was issued on March 14, 2000. Thereafter, Exceptions and Reply Exceptions were filed as noted above.

By Opinion and Order entered on September 1, 2000, the Commission denied the Exceptions of Chester, Amtrak, Conrail, PennDOT and the County for those reasons which more fully and appear in the Opinion and Order. Additionally, the Recommended Decision of the ALJ was adopted, consistent with the Opinion and Order. The allocation of costs and work to be performed was ordered as follows:

(a) 75% of the costs to furnish all materials and perform all work necessary to maintain the substructure, superstructure and deck of the bridge was allocated to the City of Chester which was to perform the work;

(b) the remaining 25% of the costs was divided among Conrail (15%), the County (5%) and PennDOT (5%).

(c) Amtrak was exempted from contribution based upon 49 U.S.C. § 2431(1), and SEPTA was exempted from contribution based on a consent decree between SEPTA and the Public Utility Commission in a separate matter; *Southeastern Pennsylvania Transportation Authority v. Pennsylvania Public Utility Commission*, U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 95-CV-4500 (January 19, 1996).

The City, County and Conrail filed *Petitions for Review* in the Commonwealth Court of Pennsylvania, which were consolidated. By Opinion and Order dated April 27, 2001, the Commonwealth Court vacated the September 1, 2000 Order of the Commission and remanded the proceeding to the Commission. The purpose of the Remand was for the

Commission to hold an additional hearing and to issue an adjudication to apportion costs for the repair and maintenance of the Lloyd Street Bridge among the Parties to the proceeding, *including Amtrak and SEPTA*.

In accordance with the remand Order, and pursuant to due notice, a hearing was held on July 13, 2001. SEPTA, Chester, the County, Norfolk Southern, Conrail, Amtrak, the BTS and PennDOT participated at the hearing. The ALJ placed in the record a Letter dated July 11, 2001, from counsel for CSX Transportation (CSX) which indicated that CSX would not be attending the hearing. The Letter also stated, *inter alia*, that CSX had a right of access to Amtrak's rail line at the site of the crossing. CSX however, did not currently operate over the line, nor did it have any definite plans at this point to do so in the future. (Tr., p. 216).

In addition, a July 12, 2001 Letter, from counsel for Verizon PA was placed in the record stating, *inter alia*, that although Verizon PA had facilities in the area of the crossing, it (Verizon PA) was not seeking reimbursement of any costs in connection with the project. Verizon PA further stated that it was willing to inspect and maintain its own facilities at its sole cost and expense, but would not agree to bear any costs or responsibilities for inspection or maintenance of the crossing structure. Finally, Verizon PA stated that by reason of the foregoing, it did not intend to participate at the hearing. (Tr., p. 217).

ALJ Smolen incorporated into the record of the instant remand proceeding the evidentiary record of the prior hearings held in this matter (Tr., pp. 219-220). Thereupon, the hearing on remand proceeded and produced an additional record consisting of a transcript of 121 pages (Tr., pp. 208-328) and four additional exhibits (Delaware County—1; City of Chester—2 late-filed; and Norfolk Southern—1). Briefs and Reply Briefs were filed.

In the Recommended Decision, issued on August 7, 2001, ALJ Smolen recommended an allocation of costs and responsibilities for the Lloyd Street Bridge, including Amtrak and SEPTA in that allocation, in compliance with the direction of the Remand Order from the Commonwealth Court. (R.D., pp. 34-35). Exceptions and Reply Exceptions to the August 7, 2001 Recommended Decision were filed as above noted.

Discussion

In his Recommended Decision, ALJ Smolen noted that all the Findings of Fact set forth in the Recommended Decision of April 29, 1999, were incorporated and made part of the instant proceeding, to the extent that they are consistent with the ALJ's additional Findings of Fact. ALJ Smolen also made additional Findings of Fact from No. 87 [2] to No. 139. (R.D., pp. 4-12).

ALJ Smolen also drew eleven Conclusions of Law (R.D., pp. 36-38). We shall adopt and incorporate herein by reference the ALJ's additional Findings of Fact and Conclusions of Law to the extent that they are not expressly or by necessary implication overruled or modified by this Opinion and Order.

Initially, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. (*University of Pennsylvania, et al. v. Pennsylvania Public Utility Commission*, 86 Pa. Commw. 410, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984) (*University of Pennsylvania v. Pa. PUC*). Any exception or argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

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[2] The ALJ commenced the numbering of the additional Findings of Fact at Number 87, he stated, in order to avoid confusion and for the sake of uniformity and clarity. (R.D., p. 4).

Exceptions of the BTS and Norfolk Southern

The BTS files two Exceptions to the Recommended Decision. Norfolk Southern files six Exceptions to the Recommended Decision.

The BTS's first Exception and Norfolk Southern's sixth Exception will be considered jointly, since they are inter-related. In those Exceptions, the BTS and Norfolk Southern object to Ordering Paragraph No. 14 of the Recommended Decision, which is as follows:

> 14. That should the conflicting federal/state judicial decisions be resolved requiring application of the federal exemptions in connection with the allocation of costs and work responsibilities at rail-highway crossings, then and in such event, the allocations of costs upon Amtrak and SEPTA set forth in this Order are hereby rescinded and revoked; whereupon any such costs advanced by Amtrak and SEPTA shall be refunded to them and the matter shall be set down for determination of the reallocation of said costs.

The BTS and Norfolk Southern contend that the foregoing Ordering Paragraph is not necessary. (BTS Exc., p. 1-2; NS Exc., pp. 4-5).

On review of these Exceptions, we find them to be meritorious. We reach this conclusion because we reason that, if a future court proceeding in any way negates the Commission's Order, the Commission can issue a subsequent Order that would reallocate the costs from Amtrak and SEPTA to other parties. At the same time, the Commission can address reimbursement of any costs that Amtrak and SEPTA may have advanced. We do not believe that it would be advisable, at this time, to issue an order that may become partially revocable depending on some future court action.

We can only issue a decision based on the facts and law that exist at the time of the decision and, therefore, it is unnecessary to address future events that may not occur.

Accordingly, Ordering Paragraph No. 14 will be stricken. The BTS's first Exception and Norfolk Southern's sixth Exception are granted.

In its second Exception, the BTS excepts to Ordering Paragraph No. 15 of the Recommended Decision, which is as follows:

> 15. That nothing herein shall preclude or prevent any party from seeking a reallocation of cost and maintenance responsibilities for the Lloyd Street rail-highway crossing in the future by reason of changed circumstances or conditions.

The BTS also contends that this Ordering Paragraph is not necessary. (BTS Exc., p. 2).

On review of this Exception, we find it to be meritorious. We agree that the foregoing Ordering Paragraph is not necessary. Section 703(g) of the Public Utility Code (Code), 66 Pa. C.S. § 703(g), sets forth the authority of the Commission to rescind or amend any order it issues. Additionally, the decisions of the appellate courts of the Commonwealth interpreting this statute have set forth under what circumstances the Commission may rescind or amend an order. Therefore, under Section 703(g), any party to a proceeding is authorized to petition the Commission for rescission or amendment of any entered order. Accordingly, Ordering Paragraph No. 15 will be stricken from the instant Opinion and Order as not necessary.

Accordingly, the BTS' second Exception is granted.

In its first Exception, Norfolk Southern objects to the reference to Norfolk Southern "owning" a freight service

easement at the subject crossing, as stated in Finding of Fact No. 97, on page 6 of the Recommended Decision, which reads as follows:

> 97. Norfolk Southern desires to increase the rail business that it would operate under this bridge and is aware that senior management is presently negotiating regarding future business. (N.T., pp. 289, 294, 309). Norfolk Southern owns a freight service easement at the crossing.

Norfolk Southern contends, instead, that it leases the freight service agreement, which is owned by Pennsylvania Lines LLC. (Tr., p. 272; Norfolk Southern Exh. No. 1). (NS Exc., p. 1).

We note that Finding of Fact No. 89, on page 5 of the Recommended Decision, reads as follows:

> 89. Pennsylvania Lines LLC, which is owned by Consolidated Rail Corporation, leases the rights it acquired from Conrail to Norfolk Southern (N.T. 272; Norfolk Southern Exh. No. 1).

We find that the evidentiary record herein supports Finding of Fact No. 89 as reflecting the actual state of affairs with regard to the pertinent lease. Accordingly, in order to clear up this ambiguity in the Recommended Decision, we shall strike the last sentence from Finding of Fact No. 97.

In its third Exception, Norfolk Southern objects to Conclusion of Law No. 4 as found on page 36 of the Recommended Decision, which reads as follows:

> 4. Norfolk Southern Railway Company acquired Consolidated Rail Corporation effective June 1, 1999. (N.T. 269).

Norfolk Southern avers, to the contrary, that Norfolk Southern and CSX Corporation own Consolidated Rail Corporation. (NS Exc., p. 2).

On review of this Exception, we find it to be meritorious. Indeed, Finding of Fact No. 90, on page 5 of the Recommended Decision reads as follows:

> 90. Norfolk Southern Corporation and CSX Corporation own Consolidated Rail Corporation. (N.T. 272).

We find that the evidentiary record herein supports Finding of Fact No. 90 as reflecting the actual state of affairs with regard to the ownership of Consolidated Rail Corporation. Accordingly, in order to clear up this ambiguity in the Recommended Decision, Conclusion of Law No. 4 shall be stricken.

Accordingly, Norfolk Southern's Exceptions Nos. 1, 3, and 6 are granted. Norfolk Southern's remaining Exceptions are denied. *University of Pennsylvania v. Pa. PUC, supra.*

Exceptions of the County

The County files two Exceptions to the Recommended Decision that will be considered jointly, since they are interrelated. The County contends that, while it takes no exception to the ALJ's Findings of Fact as contained in his Recommended Decision, the reasoning used in the ALJ's allocation of costs in this matter fails to consider the contribution of liquid fuel money that the County makes to the City. The County further contends that the ALJ also failed to consider the policy implications that such allocation may have on the distribution of liquid fuel money to other municipalities within the County. (County Exc., pp. 1-4).

The City responds to the County's Exceptions on this issue, stating that those Exceptions are misplaced. Specifically, the County argues that no credit for the liquid fuels tax fund already allocated to the City should be granted to the County. (City R. Exc., pp. 1-2).

On review of the County's Exceptions, we find them not to be meritorious. Specifically, the County contended that the ALJ did not, in his recommended allocation of responsibility

for the costs of repair and maintenance for the pertinent bridge, give any weight to the liquid fuel funds that the County has already provided to the City. Even if that statement were correct, however, we conclude that the ALJ was correct in that assessment.

As presented by the County, it has received from the Commonwealth for several years liquid fuel tax funds that have been distributed to several municipalities for repair and maintenance of bridges and roadways. The evidentiary record established that the City has used its allocated share of those funds for the repair and maintenance of eighty-seven miles of City streets and highways, as approved by PennDOT. (R.D., pp. 10-11). Presumably, those repairs and maintenance were needed, or PennDOT would not have approved them.

The County now seeks to convince us that the City should have, instead, devoted those sums toward the repair and maintenance of the pertinent bridge. This argument is not persuasive. Although we may consider the cause of the current state of the bridge's deterioration, our purpose here is not to place blame for the past. Rather, we seek to ensure that the bridge is properly maintained in the future. We identify the County as a party which benefits from the existence of this crossing since its citizens use it. The source of the funding that either the County or the City uses to maintain the bridge is beyond our jurisdiction.

Accordingly, for the above reasons, the County's Exceptions are denied.

Exceptions of PennDOT

PennDOT files two Exceptions to the Recommended Decision that will be considered jointly, since they are interrelated. In those Exceptions, PennDOT objects to the ALJ's conclusion that, since PennDOT receives a benefit from the existence of the pertinent grade-separated crossing

and bridge, PennDOT should reimburse the City for five percent of the City's cost for the maintenance of the substructure, superstructure and deck. (R.D., pp. 38-39, Proposed Ordering Paragraph No. 2).

PennDOT furthermore contends that the ALJ's conclusion, and his proposed allocation to five percent of the costs to PennDOT, is not supported by the evidentiary record. PennDOT avers that the liquid fuel funding that the City receives from PennDOT, *via* the County, adequately satisfies any duty PennDOT may have in relation to Lloyd Street and that any additional allocation to PennDOT in this case would constitute an unwarranted "double dip" into Commonwealth funds. (PennDOT Exc., pp. 2-7).

The City rejoins that the ALJ had properly allocated to PennDOT a portion of the costs for the repair and maintenance of the pertinent bridge. (City R. Exc., pp. 2-3).

PennDOT's statement that "[T]he Commission's original allocation in this matter constitutes a doubledip into Commonwealth funding, at the expense of other equally deserving and needy communities." (PennDOT Exceptions, pp. 5-6). This statement is not convincing. There is no evidence that PennDOT's grant of liquid fuels tax money to a community acts as a legal bar to the Commission's allocation of costs to PennDOT for a rail-highway bridge which carries a local road.

In addition, the Commission's allocation of costs in rail-highway crossing cases is based on the circumstances of the case. It is not based on the sourse of the funding that a party found to benefit from the crossing may use. We may safely assume that PennDOT will have sufficient funding to fulfill its statutory mandates or the Legislature will act to rectify the situation. The identity of the fund from which PennDOT's check is ultimately drawn will not affect the Commission's finding that the state highway system benefits form the Lloyd Street Bridge. (Finding of Fact No. 136, R.D., p. 11).

We also find that Lloyd Street connects with two State highways (Initial Hearing Tr., pp. 25, 164). The fact that another local street nearby is even more of an asset to the state highway system does not change the fact that Lloyd Street is also a feeder. We furthermore find that the evidentiary record does not support PennDOT's assertion that it is already fully funding any conceivable obligation it might have in relation to Lloyd Street. (PennDOT Exc., p. 5). We, therefore, conclude that an allocation of costs to PennDOT by the Commission is proper under the facts and evidence presented herein.

Accordingly, PennDOT's Exceptions are denied.

Exceptions of the City

In its Exception No. 3, the City argues that PennDOT should be made to bear more than five percent of the costs, as recommended by the ALJ, for the maintenance and upkeep of the Lloyd Street Bridge. To buttress its argument, the City cited *Com. of Pa., Department of Transportation v. Pa. PUC*, 469 A.2d 1149 (Pa. Commw. 1983) (*PennDOT v. Pa. PUC*) for the proposition that substantial percentages have been allocated to PennDOT in rail-highway cases where the highway was not a state highway. (City Exc., pp. 2, 7-10).

PennDOT responds to that Exception of the City, stating that, notwithstanding PennDOT's position that it should not be subject to any allocation in this case, the City's conclusion is not supported by the cited case. (PennDOT R. Exc., pp. 2-3).

We find that the case of *PennDOT v. Pa. PUC, supra*, is not supportive of the proposition for which the City advanced it. In that case, the Commonwealth Court noted that the allocation against PennDOT, which was forty percent, was warranted because the structure in question once carried a state highway. Moreover, PennDOT had therein a continuing obligation for paving maintenance on the structure under

previous Commission Orders. (469 A.2d at 1153). In the instant proceeding, Lloyd Street was never a State highway, and PennDOT was never under any obligation to maintain any portion of the Lloyd Street structure.

Accordingly, we find the ALJ's recommended five percent allocation to PennDOT to be, in accord with the evidentiary record and the applicable law. For these reasons, the City's Exception No. 3 is denied.

Similarly, in its Exception No. 4, the City objects to the ALJ's recommended allocation of five percent of the costs for repair and maintenance of the pertinent bridge to the County, arguing that the County should receive a bigger percentage of the costs of maintenance associated with this project. In support of this argument, the City cites to *County of Chester v. Pa. PUC*, 408 A.2d 552 (Pa. Commw. 1979) (*County of Chester v. Pa. PUC*). (City Exc., pp. 3, 7-10).

The County rejoins that there is no basis in the evidentiary record herein for an increased allocation of financial responsibility to the County. The County further contends that the cited case of *County of Chester v. Pa. PUC, supra*, is not relevant to the instant proceeding. Specifically, the County noted that the City had cited that case for the proposition that the County should receive an increased allocation. (County R. Exc., pp. 1-3).

For the reasons we have outlined above, in our discussion and disposition of the County's Exceptions, we conclude that the City's Exception No. 4 is not meritorious. As we have discussed above, a five percent allocation for the costs of repair and maintenance of the bridge to the County, as recommended by the ALJ, is reasonable, and well supported by the evidentiary record. Additionally, we note that the in the case cited by the County, *County of Chester v. Pa. PUC, supra*, Chester County was allocated twenty-five percent of the financial responsibility for rebuilding a railroad bridge

overpass. However, we further note that the amount of the allocation to Chester County was not at issue in that decision. Rather, the issue therein was whether Chester County was an interested party who could be allocated any responsibility at all.

For these reasons, the City's Exception No. 4 is denied.

Exceptions of Amtrak and SEPTA

Amtrak's Exception No. 7 and SEPTA's Exception No. 4 will be discussed jointly, since they are interrelated. In those Exceptions, the Parties argue that the Commission should not seek to resolve this conflict of law by an appropriate action in a court of competent jurisdiction. (Amtrak Exc., p. 8; SEPTA's Exc., pp. 6-8).

PennDOT responds to those Exceptions, arguing that the Commission has no choice but to seek such a resolution due to the fact that Amtrak and SEPTA refuse to recognize the validity of the Commonwealth Court's jurisdiction and orders. PennDOT avers that, for its part, it recognizes that the fundamental problem presented by this proceeding is that the Commission is theoretically bound by two orders, and that compliance with both of them is impossible. (PennDOT R. Exc., pp. 4-5).

We conclude that Amtrak's Exception No. 7 and SEPTA's Exception No. 4 are not meritorious. We will discuss the issue raised by those Exceptions at greater length *infra*, in the Conflict of Law section of this Opinion and Order.

Conflict of Law Issue

We wish to emphasize that the paramount consideration in proceedings of this nature, from our point of view, is the promotion and enhancement of the safety of the public and the prevention of accidents. Inherent therein is the necessity to identify the contributing factors to unsafe conditions at rail-highway crossings and approaches thereto.

Among the factors which the Commonwealth Court noted in the *Greene Township* [3] case as relevant to an allocation of costs in rail-highway crossing cases are the following: (1) which party built the crossing; (2) whether a roadway existed before or after the construction of the crossing; (3) relative benefit conferred on each party with the construction of the crossing; (4) whether either party is responsible for the deterioration of the crossing which has lead to the need for its repair, replacement or removal; and (5) the relative benefit that each party will receive from the repair, replacement or removal of the crossing. While the Commission has considered these factors to be relevant in the past, this in no way limits the factors that the Commission can consider. (*Bell Atlantic-Pa., Inc. v. Pa. P.U.C.*, 672 A.2d 352 (Pa. Cmwlth. 1996)).

We note that the Parties in the instant matter recognize and understand that the Commission's authority to assign work and allocate costs is complicated where the facilities of Amtrak and SEPTA are involved at the crossing. The current status is that the Commonwealth Court of Pennsylvania and the United States Court of Appeals for the Third Circuit differ over whether the Commission has ~~the~~ authority to allocate costs and assign work to Amtrak and SEPTA for rail-highway bridge crossings.

As to Amtrak, the Commonwealth Court has held that the Commission may allocate highway bridge costs to Amtrak while the Court of Appeals held that it may not. (*See National Railroad Passenger Corporation v. Commonwealth of Pennsylvania Public Utility Commission*, 655 F. Supp. 402 (E.D. Pa. 1987), *Aff'd* 848 F.2d 436 (3rd Cir. 1988), *cert. Denied*, 108 S.Ct. 231 (1988) and *City of Philadelphia v. Pa. PUC*, 676 A.2d 1298 (Pa. Commw. Ct. 1996), *alloc. Denied*,

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[3] *Greene Township v. Pa. PUC*, 668 A.2d 615 (Pa. Commw. Ct. 1995).

546 Pa. 654, 682 A.2d 558 (1996), *cert. Denied*, 117 S. Ct. 1334 (1997); *Parkesburg Borough v. Pa. PUC*, 681 A.2d 872 (Pa. Commw. Ct. 1996)).

As to SEPTA, the Commonwealth Court has likewise held that the Commission may allocate costs to SEPTA, while the Court of Appeals has held that it may not. (*See SEPTA v. Pa. PUC*, 140 Pa. Commw. Ct. 270, 592 A.2d 797 (1991), *alloc. Denied*, 611 A.2d 714 (Pa. 1992) and *SEPTA v. Pa. PUC*, 826 F. Supp. 596 (E.D. Pa. 1993), *Aff'd.*, 27 F.3d 558 (1994), *cert. Denied*, 115 S. Ct. 318 (1994)). The matter is further complicated by a Consent Decree entered into between the Commission and SEPTA; that Consent Decree bars the Commission from assigning costs and responsibility for highway bridges to SEPTA.

In the instant matter, as outlined above, the Commonwealth Court's Order vacates the Commission's Order of September 1, 2000, which Order complied with the Third Circuit decisions and observed the Consent Decree. The Commonwealth Court Order further remands the proceeding to the Commission to conduct an additional hearing and allocate costs among the parties, including Amtrak and SEPTA. This mandate is interpreted to mean that Amtrak and SEPTA are to be included for consideration for cost allocations but not that costs *must* be allocated to them. In addition, the Commonwealth Court held that because the City, Delaware County and Conrail were not parties to the consent decree between the Commission and SEPTA, their due process rights had been violated by the Commission's observance of the Consent Decree's prohibition against assigning costs to SEPTA.

Further, the Court affirmed the Commission's authority to assign responsibilities and allocate costs to the City despite the Municipalities Financial Recovery Act. The Court held that the City's financial condition is not controlling or determinative for purposes of allocating costs for

maintenance of the Lloyd Street crossing and that the Commission need not consider the City's or any other party's financial condition in allocating costs for maintenance of the Lloyd Street bridge.

The BTS as well as other Parties (excluding Amtrak and SEPTA) maintained that the Commission must follow the Commonwealth Court's Remand Order in this case, stating that the Commission has no power to deviate from the Order of the Commonwealth Court. (*See City of Philadelphia v. Pa. PUC*, 720 A.2d 845 (Pa. Commw. Ct. 1998), *alloc. Denied*, 560 Pa. 689, 742 A.2d 677 (1999)). The BTS pointed out that the Pennsylvania Supreme Court in *Haefele v. Davis*, 380 Pa. 94, 110 A.2d 233 (1955), set for the power of the lower court when a matter is remanded to it:

> A lower court is without power to modify, alter, amend, set aside or in any manner disturb or depart from the judgment of the reviewing court as to any matter decided on appeal . . . under any other rule, litigation would never cease, and finality and respect for orderly process of law would be overcome by chaos and contempt. 380 Pa. At 98, 110 A.2d at 235.

The BTS asserted that this rationale has been followed consistently by the Appellate Courts of the Commonwealth of Pennsylvania. (*See In Re Estate of Banes*, 479 Pa. 264, 388 A.2d 319 (1978); *Blymiller v. Ballanti*, 236 Pa. Super. 211, 344 A.2d 680 (1975); *Roskwitalski v. Reiss*, 338 Pa. Super. 85, 487 A.2d 864 (1985)). Moreover, continued the BTS, the Court of Appeals for the Third Circuit also follows this same rationale. (*See Cowgill v. Raymark Industries, Inc.*, 832 F.2d 798 (3rd Cir. 1987)). Additionally, the Court of Appeals for the Third Circuit has stated that pursuant to 28 U.S.C. § 1738, it must give preclusive effect to a state court decision if courts of that state would do so. (*Schroeder v. Acceleration Life Insurance Company of Pennsylvania*, 972 F.2d 41 (3rd Cir. 1992)).

Thus, reasoned the BTS, if this rule of law applies to the power of the trial court on a matter remanded by an Appellate Court, then it follows that the same rule applies to the power of an administrative agency on a matter remanded by an Appellate Court. That is to say, if the trial court cannot alter the Remand Order of an Appellate Court, neither can an administrative agency. The trial court or administrative agency must proceed on remand in a manner consistent with the opinion of the Appellate Court. (*Commonwealth v. Tick, Inc.*, 431 Pa. 420, 246 A.2d 424 (1968)).

Pursuant to the foregoing judicial precedent, we must follow the Commonwealth Court's Remand Order and consider all of the Parties, including Amtrak and SEPTA, in our allocation order in this case, without regard to their financial condition. However, we wish to emphasize that our observance of the Commonwealth Court mandate should not, in any way whatsoever, be construed to be disrespectful to the Third Circuit and its decisions. However, we believe that this judicial conflict must ultimately be resolved by a court of competent jurisdiction.

It is not the purpose of this Opinion and Order to decide the Amtrak/SEPTA exemption issue and which line of judicial authority will eventually be upheld. Instead, in this Opinion and Order we have attempted to:

(a) protect and promote the public safety by having maintenance performed on the Lloyd Street rail-highway crossing without further delay;

(b) observe the mandate of the Commonwealth Court Remand Order in this proceeding;

It bears repeating that arguments by Amtrak and SEPTA concerning the applicability of the federal exemptions and the Consent Decree are not controlling to the instant matter because we are bound to follow the direction of the Commonwealth Court on remand. (*Haefele v. Davis, supra.*). It is

clear that, under a traditional analysis, the railroads which either own the right-of-way under the bridge or operate on it would be allocated some portion of the cost and/or responsibility for maintaining a separated crossing. Thus, under the Remand Order, we had no choice but to consider Amtrak, SEPTA and the City for cost and work allocations, and to allocate some costs or responsibilities to each.

It is clear that this issue will continue to plague us until either the Pennsylvania or the United States Supreme Court has an opportunity to resolve this conflict issue. This conflict of law has so far not only created a procedural morass for counsel, but also has the potential to negatively affect the safety of rail highway crossings in the Southeastern quadrant of the Commonwealth. All Parties should be cognizant that we need a final resolution of this issue in order to allow us to pursue our paramount mission in this type of case which, as aforesaid, is the promotion of the safety of the travelling public by ensuring safe and well-maintained rail highway crossings in the Commonwealth.

Conclusion

We have carefully reviewed the record as developed in this proceeding, including the ALJ's Recommended Decision and the Exceptions and Reply Exceptions filed thereto. Premised upon our review, the Parties' Exceptions will be granted or denied consistent with this Opinion and Order. Accordingly, the ALJ's Recommended Decision will be adopted as modified by this Opinion and Order; THEREFORE,

IT IS ORDERED:

1. That the Exceptions filed by Norfolk Southern Railway Company on August 13, 2001 to the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen that was issued on August 7, 2001, are hereby granted, in part, and denied, in part.

2. That the Exceptions filed by the Commission's Bureau of Transportation and Safety on August 14, 2001 to the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen that was issued on August 7, 2001, are hereby granted.

3. That the Exceptions filed by the County of Delaware on August 15, 2001 to the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen that was issued on August 7, 2001, are hereby denied.

4. That the Exceptions filed by the Pennsylvania Department of Transportation on August 16, 2001 to the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen that was issued on August 7, 2001, are hereby denied.

5. That the Exceptions filed by the Southeastern Pennsylvania Transportation Authority on August 16, 2001 to the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen that was issued on August 7, 2001, are hereby denied.

6. That the Exceptions filed by City of Chester on August 16, 2001 to the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen that was issued on August 7, 2001, are hereby denied.

7. That the Exceptions filed by the National Railroad Passenger Corporation on August 17, 2001 to the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen that was issued on August 7, 2001, are hereby denied.

8. That the Recommended Decision on Remand of Administrative Law Judge Herbert Smolen herein, which was issued on August 7, 2001, is hereby adopted as modified by this Opinion and Order.

9. That the City of Chester, at its initial cost and expense, furnish all material and perform all work necessary

to maintain the substructure, superstructure and deck of the Lloyd Street rail-highway bridge crossing; all in a safe and satisfactory condition.

10. That the National Railroad Passenger Corporation, the Southeastern Pennsylvania Transportation Company, the Norfolk Southern Railway Company, the County of Delaware and the Pennsylvania Department of Transportation reimburse the City of Chester in an amount equal to 25% of the costs incurred by the City of Chester in maintaining the substructure, superstructure and deck of the bridge, exclusive of the wearing surface, curbs and sidewalks on the bridge, in the following proportions:

(a) National Railroad Passenger Corporation - 5%

(b) Southeastern Pennsylvania Transportation Authority - 5%

(c) Norfolk Southern Railway Company - 5%

(d) County of Delaware - 5%

(e) Pennsylvania Department of Transportation - 5%

11. That the City of Chester bear all of the remaining costs incurred in furnishing material and performing work in accordance with Ordering Paragraph 9 hereof.

12. That the City of Chester, at its sole cost and expense, furnish all material and perform all work necessary:

(a) to maintain the curbs and sidewalks and wearing surface on the bridge; and

(b) to maintain the highway approaches to the bridge, including the wearing surface and the curbs and sidewalks thereon; and

(c) to remove snow, ice and debris from all of the items listed in (a) and (b) above;

provided however that nothing contained herein shall prohibit the City of Chester or the County of Delaware from enforcing any applicable laws and/or ordinances pertaining thereto.

13. That the City of Chester, at its sole cost and expense, at least once every year following the date of the entry of the instant Opinion and Order, perform an in-depth inspection of the entire structure. The City is further directed to prepare and submit to the Commission's Bureau of Transportation and Safety and to all Parties to this proceeding a detailed in-depth inspection report. That report shall include, *inter alia*, a structural analysis of the bridge, its load-carrying capacity, what maintenance work the City of Chester has performed since the date of entry of the instant Opinion and Order, and any changes in the condition of the bridge which would affect the safety and well being of the travelling public. That report shall also include any specific recommendations as to what additional repairs and/or work should be performed and when such repairs and work will be done, together with the status of the City's efforts to secure funding for bridge replacement.

14. That the City of Chester, at least fifteen days prior to the start of each inspection and/or maintenance work, shall notify all Parties in interest of the actual date on which each such inspection and/or work shall begin.

15. That the National Passenger Railroad Corporation, at its initial cost and expense, provide watchmen and flagmen, if necessary, and any and all other protection necessary for all rail operations, including those of Norfolk Southern Railway Company, the National Passenger Railroad Corporation and the Southeastern Pennsylvania Transportation Authority, during performance of the maintenance and inspection work ordered in Ordering Paragraphs 9, 12 and 13 hereof.

16. That the Norfolk Southern Railway Company and the Southeastern Pennsylvania Transportation Authority reimburse the National Railroad Passenger Corporation in an amount equal to 55% of the costs incurred by the National Railroad Passenger Corporation in complying with Ordering Paragraph 15, in the following proportions:

(a) Norfolk Southern Railway Company - 10%

(b) Southeastern Pennsylvania Transportation Authority - 45%

17. That the National Railroad Passenger Corporation bear all of the remaining costs incurred in supplying materials and performing the work in accordance with Ordering Paragraph 15 hereof.

18. That in complying with the provisions of this Opinion and Order, all Parties cooperate and coordinate their respective duties, obligations and work with each other.

19. That the National Railroad Passenger Corporation, the Southeastern Pennsylvania Transportation Authority and the Norfolk Southern Railway Company, each respectively, at their respective sole cost and expense, furnish all material and perform all work necessary to maintain their respective facilities, property and attachments to the bridge, if any, at the crossing and the approaches thereto; all in a safe, satisfactory and fully operational condition.

20. That each non-carrier utility, at its respective sole cost and expense, furnish all material and perform all work necessary to maintain its respective facilities and property, if any, at the crossing and the approaches thereto; all in a safe and satisfactory condition.

21. That this Opinion and Order, insofar at it places costs on various parties in this proceeding, is without prejudice to the rights of such parties to recover said costs from others in accordance with any lawful agreements.

22. That this Opinion and Order is binding upon the Parties hereto, their respective successors and assigns.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: September 7, 2001

ORDER ENTERED: September 7, 2001

APPENDIX D

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held August 31, 2000

Commissioners Present:

John M. Quain, Chairman
Robert K. Bloom, Vice Chairman
Nora Mead Brownell
Aaron Wilson, Jr., Recusing
Terrance J. Fitzpatrick

I-00970070

Investigation upon the Commission's own motion to determine the conditions, disposition, and responsibility for maintenance of the existing crossing structure carrying Lloyd Street above-the-grade of the tracks of National Railroad Passenger Corporation in the City of Chester, Delaware County (AAR 540 958 N)

OPINION AND ORDER

BY THE COMMISSION:

Before the Commission for consideration and disposition are the Exceptions filed by various Parties to the Recommended Decision of Administrative Law Judge (ALJ) Herbert Smolen, which was issued on March 14, 2000.[1]

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[1] The original due date for filing Exceptions was April 3, 2000. On March 29, 2000, counsel for the City of Chester requested a two (2) week extension of time in which to file Exceptions. That request was granted

Several Parties filed Exceptions to the Recommended Decision. Those Parties, and the date on which they filed, are as follows: (1) City of Chester (Chester), on April 14, 2000; (2) National Railroad Passenger Corporation (Amtrak), on April 14, 2000; (3) Consolidated Rail Corporation (Conrail), on April 17, 2000; (4) Pennsylvania Department of Transportation (PennDOT), on April 17, 2000; and (5) Delaware County (County), on April 17, 2000.

Additionally, the following Parties filed Reply Exceptions on the date indicated: (1) Chester, on April 20, 2000,[2] (2) Conrail, on April 27, 2000; and (3) PennDOT, on April 27, 2000.

History of the Proceeding

By Order entered on October 6, 1997, the Commission instituted an investigation upon its own motion to determine the condition, disposition, and responsibility for maintenance of the existing crossing structure carrying Lloyd Street above-the-grade of the tracks of Amtrak in Chester, Delaware County.

A prior Commission Order entered on May 29, 1997, at Docket No. M-00970921, affirmed the action of Chester in posting the Lloyd Street Bridge for a five (5) ton weight limit. Thereafter, a Field Conference was held on July 14, 1997, and, because no concerned party agreed to accept responsibility for maintaining the structure, the instant proceeding was instituted by the October 6, 1997 Order. That Order also directed that PennDOT, Chester, Delaware County,

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per Secretarial Letter dated April 6, 2000, by which all Parties hereto were granted until April 17, 2000, in which to file their Exceptions.

[2] In addition to its Reply Exceptions filed on April 20, 2000, Chester also filed another set of Reply Exceptions on April 27, 2000. The April 27 Reply Exceptions replied specifically to the arguments made in Amtrak's and Conrail's Exceptions.

Amtrak, Southeastern Pennsylvania Transportation Authority (SEPTA), Philadelphia Electric Company (PECO), Bell Atlantic-PA (BA-PA), Philadelphia Gas Works (PGW) and AT&T Communications be made Parties to this proceeding.

A hearing herein was held on April 28, 1998, wherein the BTS, Amtrak, SEPTA, and PennDOT presented testimony.

By Order dated May 22, 1998, the record was reopened directing Conrail be made a party to the proceeding and that Chester and the County be served with notice of any further hearing. An additional hearing was held on July 7, 1998, wherein testimony was received from Conrail and Amtrak. Chester was directed to serve all Parties with responses to the Commission's Questions and Procedures for review by the Parties with a view toward possible cross-examination.

On September 11, 1998, Conrail and PennDOT filed separate Motions to Strike the written direct testimony of Chester. Thereafter, a further hearing was scheduled in order to afford Chester an opportunity to present its testimony. That hearing was held on November 13, 1998, and Chester presented three (3) witnesses and two (2) Exhibits. In addition, Conrail introduced one (1) additional Exhibit. The record consists of 207 pages of transcript and various Exhibits. Briefs and Reply Briefs were filed.

The Recommended Decision of the ALJ was issued on March 14, 2000. Exceptions and Reply Exceptions were filed as above noted.

Discussion

In his Recommended Decision, ALJ Smolen made 86 Findings of Fact (R. D., pp. 3-13) and drew eight (8) Conclusions of Law (R. D., pp. 33-34). We shall adopt and incorporate herein by reference the ALJ's Findings of Fact and Conclusions of Law to the extent that they are not expressly, or by necessary implication, overruled or modified by this Opinion and Order.

Initially, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. (*University of Pennsylvania v. Pennsylvania Public Utility Commission*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984)). Any Exception or argument that is not specifically addressed shall be deemed to have been duly considered and denied without further discussion.

Exceptions of the City of Chester

Chester filed two (2) Exceptions to the Recommended Decision herein, which will be considered jointly, since they are interrelated. The gist of Chester's arguments is that the Commission should refrain from allocating costs to Chester based on the City's status as a Financially Distressed Municipality.

We find that the Pennsylvania appellate courts have long held that evidence regarding an entity's financial inability to pay is irrelevant in Commission cost allocation proceedings, and should not be considered by the Commission. *East Rockhill Township v. Pa. PUC*, 540 A.2d 600 (Pa. Cmwlth. 1988). In the case of *Department of Highways v. Pa. PUC*, 190 Pa. Super. 1, 151 A.2d 850, the Superior Court made this statement regarding ability to pay as a factor in Commission cost allocations:

> We fail to see in the absence of some specific statutory provision authorizing such factor to be considered relevant or determinative, how the financial ability to pay, in a litigation such as here involved, would control or be determinative of the issue on allocation. Counsel for the Department has cited no authority to us for this position, and we have been unable to find such authority. Nor do we believe that the legislature contemplated that

> the Commission, in making allocation of costs, should enter into complicated questions of municipal taxation.

(151 A.2d 850,). We further find that the rationale behind this policy is clear. If the Commission were to be forced to consider inability to pay as a factor in allocating costs, it would become ensnared in deciding which municipality or other concerned entity is more financially able to bear costs. The Commission would be forced to evaluate each entity's budget and revenue in order to determine whether that entity is financially able to bear any cost in a rail-highway crossing project.

Clearly, in considering the issues attendant to this type of proceeding, our primary focus must be the prevention of accidents and the promotion of safety. Consideration of the issue of financial ability to pay could turn this type of litigation into a contest among the concerned parties as to which one is least able to pay for the work which all agree needs to be done.

Finally, as the Commonwealth Court noted in *Department of Transportation v. Pa. PUC*, 469 A.2d 1149 (Pa. Cmwlth. 1983), at Footnote 12, municipalities have sufficient revenue raising ability to offset any deficit created by Commission cost allocations. For all of the above reasons, Chester's Exceptions are denied.

Exceptions of Conrail

Conrail filed three (3) Exceptions to the Recommended Decision, which will be considered jointly, since they are interrelated.

Conrail objected to certain portions of the ALJ's Ordering Paragraphs 2, 7, and 9 (found on pages 34-35, 36, and 37 of the R.D.) which required that Conrail either perform work or bear expenses associated with the instant project. With regard to each of the specific instances cited in Ordering

Paragraphs 2, 7, and 9, Conrail argued that the allocation of the cost or the work to be performed by it, under the circumstances of this proceeding, would be contrary to law, would fail to comport with the requirement that the Commission render a decision which is "just and reasonable," and would contradict Commission precedent.

It is well settled that in rail-highway crossing cases, the guiding principal for Commission action is the public interest, i.e., to ensure and promote the protection, safety, convenience and welfare of the travelling public. To this end, the Commission has exclusive authority, under 66 Pa. C.S. §2702, to order the construction, reconstruction, alteration, repair, protection, suspension or abolition of rail-highway crossings, as well as the exclusive authority to determine and order which parties shall perform such work at the crossings and which parties shall maintain the crossings in the future. (*SEPTA v. Pa. P.U.C.*, 592 A.2d 797 (Pa. Cmwlth. 1991) *alloc. denied* 611 A.2d 714 (1992)).

Furthermore, the Commission is empowered, under 66 Pa. C.S. §2702(b), to determine and prescribe the manner in which such crossings may be constructed, reconstructed, altered, repaired, protected, suspended or abolished. The Commission is also empowered, pursuant to 66 Pa. C.S. §2702(c), to order the work performed upon such reasonable terms and conditions as it prescribes. (*Pennsylvania Game Commission v. Pa. P.U.C.*, 651 A.2d 596 (Pa. Cmwlth. 1994), *alloc. denied* 544 Pa. 649, 664 A.2d 977 (1995)). Additionally, the Commission, pursuant to 66 Pa. C.S. § 2704(a), has the exclusive authority to assess the costs of any work it orders upon the concerned parties in the proceeding in such proper proportions as the Commission may determine.

It is also within the purview of the Commission to determine which parties are concerned within the meaning of 66 Pa. C.S. §§2704(a) and 2702(c). (*County of Chester v. Pa. P.U.C.*, 408 A.2d 552 (Pa. Cmwlth. 1979)). Moreover, the

Commission's jurisdiction also extends to the approaches to rail-highway crossings. (*Department of Transportation v. Pa. P.U.C.*, 440 A.2d 657 (Pa. Cmwlth. 1982); *Springgettsbury v. Pa. P.U.C.*, 289 A.2d 762 (Pa. Cmwlth. 1972)).

Furthermore, in apportioning costs in rail-highway crossing cases, the Commission is not limited to any fixed rule, but takes all relevant factors into consideration; the only requirement being that its Order is just and reasonable. (*East Rockhill Twp. v. Pa. P.U.C.*, 540 A.2d 600 (Pa. Cmwlth. 1988); *Municipality of Monroeville v. Pa. P.U.C.*, 600 A.2d 655 (Pa. Cmwlth. 1991); *Greene Township v. Pa. P.U.C.*, 15 (Pa. Cmwlth. 1995) (*Green Township*); *Commonwealth Department of Transportation v. Pa. P.U.C.*, 464 A.2d 645 (Pa. Cmwlth. 1983). *See also Department of Transportation v. Pa. P.U.C.*, 21 Pa. Cmwlth. 576, 423 A.2d 1108 (1980)).

As aforesaid, the paramount consideration in proceedings of this nature is the promotion and enhancement of the safety of the public and the prevention of accidents. Inherent therein is the necessity to identify the contributing factors to unsafe conditions at rail-highway crossings and approaches thereto. Among the factors which the Commonwealth Court noted in the *Greene Township* case cited *supra*, as relevant are the following: (1) which party built the crossing; (2) whether a roadway existed before or after the construction of the crossing; (3) relative benefit conferred on each party with the construction of the crossing; (4) whether either party is responsible for the deterioration of the crossing which has lead to the need for its repair, replacement or removal; and (5) the relative benefit that each party will receive from the repair, replacement or removal of the crossing.

We note, however, that while the Commission has considered these factors to be relevant in the past, this in no way limits the factors that we can consider. (*Bell Atlantic-Pa., Inc. v. Pa. P.U.C.*, 672 A.2d 352 (Pa. Cmwlth. 1996)). Based on our review of Conrail's Exceptions, we conclude

that, given the totality of the circumstances herein, the ALJ's recommended apportionment of work and costs to Conrail is just, reasonable, and in accord with the evidence. In this regard, we specifically note that Conrail, as well as Amtrak and SEPTA, benefit from a separated crossing. (Tr. 25, 35, 124, 135, 179). Specifically, we note that Conrail operates approximately four (4) freight trains per day at speeds up to forty-five (45) miles per hour (Tr. 13, 123) and, therefore, benefits from the separated crossing in being afforded an interrupted highway crossing and in avoidance of possible accidents and liability claims that could arise at a grade crossing. (Tr, p. 124).

Consistent with the foregoing discussion, Conrail's Exceptions are denied.

Exceptions of PennDOT

PennDOT filed two (2) Exceptions to the Recommended Decision, which will be considered jointly, since they are interrelated.

PennDOT objected to certain portions of the ALJ's Ordering Paragraphs Nos. 2 and 8 (found on pages 34-35 and 37 of the R.D.) which required that PennDOT bear a certain portion of the expenses associated with the instant project. With regard to each of the specific instances PennDOT cited in the relevant Ordering Paragraphs, PennDOT argued that the record does not contain substantial evidence to support the allocation of any portion of the costs to PennDOT. PennDOT argues, instead, that the cost responsibility herein should be borne by the City of Chester, Delaware County, and the rail carriers as the Parties which derive a direct and substantial benefit from the existence of the crossing.

We have outlined above the standards which we are statutorily mandated to consider in apportioning the work and the expense of rail-highway crossing cases. On review of

PennDOT's Exceptions, we conclude that, given the totality of the circumstances herein, the ALJ's recommended apportionment of costs to PennDOT is just, reasonable and appropriate. In this regard, we specifically note that PennDOT has, up until the present time, performed no work on the bridge, nor has it been assigned any maintenance responsibility relative to the subject bridge. (R.D., p. 27).

Accordingly, PennDOT's Exceptions are denied.

Exceptions of Amtrak

Amtrak filed seven (7) Exceptions to the Recommended Decision.

In its Exception No. 1, Amtrak objected to Finding of Fact No. 11 found on page 4 of the Recommended Decision, which provides as follows:

> 11. Amtrak has maintenance responsibilities for the rail line and facilities located at the subject crossing under its Agreement with Conrail (N.T. 127-128; Conrail Exhibit No. 1 at 5, §2.2(c)).

Amtrak argues that the statement of this finding must be revised to conform to the evidence. Amtrak quoted from Conrail Exhibit No. 1 at Section 2.2(c), which refers to Amtrak's agreement to maintain "NEC rail properties...in a condition that will permit operation of freight trains." Amtrak contends that this quote requires the revision of Finding of Fact No. 11 in order to delete its reference to "rail line and facilities located at the subject crossing" and to instead insert the quoted language from Conrail's exhibit.

We find that, while Amtrak correctly quotes Conrail Exhibit No. 1 in its Exception, it mischaracterizes the intent of the ALJ. The ALJ was merely applying the cited contractual provision to the facts in this case to correctly paraphrase the effect of the Agreement between Conrail and

Amtrak, in relation to Amtrak's maintenance responsibilities under that Agreement. Accordingly, Amtrak's Exception No. 1 is denied.

In its Exception No. 2, Amtrak objected to the ALJ's Finding of Fact No. 19, which, essentially, states that Amtrak benefits from the separation of rail and highway traffic by being able to operate its trains unimpeded knowing that motorists and pedestrians can pass safely overhead. (Tr. 14). Amtrak contends that this Finding is inconsistent with the testimony herein.

We find that, while Amtrak objects to the cited Finding of Fact, Amtrak does not deny that it benefits from the existence of the grade-separated structure. In fact, the relevant Finding is culled from the uncontradicted testimony of Amtrak's own witness. (R.D., p. 5; Testimony of Richard Cooper). Accordingly, there is no need to revise the relevant Finding, and Amtrak's Exception No. 2 is denied.

In its Exception No. 3, Amtrak objected to Finding of Fact No. 30, which states as follows: "The purpose of the protective shield is to protect anyone from touching the overhead electrical wires." (Tr, p. 117). Amtrak contends that this Finding should be rephrased in order to reflect the fact that the protective shield protects persons from coming into contact with electrical wires under the bridge, not overhead.

We find that the correction suggested by Amtrak to the relevant Finding of Fact is technical in nature and is, additionally, unnecessary to make at this time. The thrust of Finding of Fact No. 30 is an inherent safety issue, which is captured by the verbage used by the ALJ. Accordingly, Amtrak's Exception No. 3 is denied.

In its Exception No. 4, Amtrak objected to Finding of Fact No. 58, which states essentially that Amtrak would have to erect some type of support device for its catenary structure if

the bridge were removed. (Tr. 105). Amtrak contends that nothing in the evidentiary record supports this Finding.

We find that the relevant Finding is based upon a representation of counsel for Amtrak that forms part of the evidentiary record in this proceeding. (Tr., p. 105). Accordingly, there is an adequate basis in the record for this Finding, and Amtrak's Exception No. 4 is denied.

Amtrak's Exceptions Nos. 5 and 7 will be considered jointly, since they are interrelated. In those Exceptions, Amtrak contends that the ALJ employed inaccurate legal reasoning in his Recommended Decision on pages 21, and 23-25. Specifically, Amtrak argues that the ALJ failed to consider the binding legal precedent recently issued by the Pennsylvania Supreme Court in *City of Philadelphia v. Consolidated Rail Corporation*, 747 A.2d 352 (2000) (*City of Philadelphia*).

We find that the cited case of *City of Philadelphia* does not erode or question the long-established exclusive jurisdiction of the Commission over the apportionment of work and costs at rail-highway crossings, based upon the precedents that we have discussed above. The *City of Philadelphia* case, rather, simply stands as an opinion concerned with the ownership of a particular bridge, which bridge is not subject to the present litigation.

The *City of Philadelphia* case is a decision of the Pennsylvania Supreme Court based upon a certified question from the Court of Appeals of the District of Columbia regarding ownership of the 41st Street Bridge in the City of Philadelphia. (*City of Philadelphia*, 747 A.2d at 352). The correct characterization of the case is that it disposes of the ownership of a particular bridge according to common law principles. Nowhere in the opinion does the Supreme Court question the Commission's exclusive jurisdiction to allocate costs or maintenance responsibilities. Accordingly Amtrak's Exceptions Nos. 5 and 7 are denied.

Finally, in its Exception No. 6, Amtrak objects to the ALJ's lines 13-15 on page 30 of his Recommended Decision wherein the ALJ asserted that "were it not for the Amtrak and SEPTA situation, it would have been recommended that each of them reimburse the City of Chester for a portion of the bridge maintenance costs." By the "Amtrak and SEPTA situation," the ALJ referred to the Commission's inability, based on the current state of the law, to allocate costs or responsibilities to Amtrak and SEPTA. (*See* discussion found in the R.D., pp. 20-26). At the conclusion of that discussion, on pages 25-26 of the Recommended Decision, the ALJ noted that he recommended that the Commission, at this time, refrain from assessing maintenance duties and costs upon Amtrak and SEPTA. The ALJ further noted that he made this recommendation, despite the past and future benefits to Amtrak and SEPTA from the instant bridge, for the reasons he has outlined. Amtrak, in this Exception, contends that the cited lines from the Recommended Decision are "pure dicta," and that, since those lines only express what the ALJ might have done if the law were different, those lines should be deleted.

We find that, contrary to Amtrak's contention, the above-quoted lines are not dicta, but constitute the ALJ's rationale behind the ALJ's recommended cost allocations in this proceeding. Following the section which Amtrak seeks to delete, the ALJ noted as follows: "by reason of the Amtrak/SEPTA situation, as aforesaid, and the fact that Conrail, the County of Delaware and PennDOT also receive benefits from the existence of a grade separated crossing, it is recommended . . . that they should reimburse the City of Chester for maintaining the substructure, superstructure and deck of the bridge." (R.D., p. 30).

In other words, were it not for the current state of the law, the ALJ would have recommended that Amtrak and SEPTA reimburse Chester for a portion of the bridge maintenance

costs. The ALJ noted that he was constrained to recommend that one or all of the Parties to which costs were allocated were, by necessity, allocated a greater proportion of those costs than would have otherwise been the case. Indeed, one or more of those Parties may not have been allocated any costs had a portion of those costs been allocated to Amtrak or SEPTA. Accordingly, since the passage to which this Exception refers is not dicta, but an explanation of the basis for the ALJ's recommended cost allocation, Amtrak's Exception No. 6 is denied. All of Amtrak's Exceptions are denied.

Exceptions of the County

The County filed six (6) Exceptions to the Recommended Decision. In its Exception No. 1, the County attempted to introduce into the record purported evidence of the County's liquid fuel tax distribution to the City of Chester.

We note that the County chose not to participate in the hearings held herein. However, the County is now attempting to submit evidence into the record upon the Affidavit of its counsel without presentation of a sponsoring witness or the opportunity for the other Parties to cross-examine the witness. To allow such evidence at this juncture would be contrary to the provisions of Section 5.402(a) of our Regulations, 52 Pa. Code §5.402(a) (Section 402(a)). Accordingly, the County's Exception No. 1 is denied.

The County's Exceptions Nos. 2, 3, 4, and 6 will be considered jointly, since they are interrelated. In those Exceptions, the County argues that the benefit that enures to the City of Chester from the bridge is minimal.

We note that the County chose not to participate in the hearings herein. However, the County is, at this juncture, attempting to submit evidence into the record upon the Affidavit of its counsel without the presentation of a

sponsoring witness or the opportunity for other parties to cross-examine the witness. To permit the County to submit evidence in this manner would be contrary to the provisions of Section 5.402(a), *supra*. Accordingly, the County's Exceptions Nos. 2, 3, 4, and 6 are denied.[3]

The County, in Exception No. 5, attempted to introduce into the record purported evidence that "the City of Chester does not consider the bridge necessary and is currently considering closing it to vehicular and pedestrian traffic."

We find that, as pointed out by the ALJ herein, the City of Chester has determined that the bridge is necessary since it has taken steps to apply for funds to replace it. (R.D., p. 27, citing Tr., pp. 162-163, 169). The County's Exception No. 5 contradicts the evidence of Chester's witness as cited by ALJ Smolen. We find that Chester's action in taking steps to apply for funds to replace the bridge constitutes credible evidence that Chester does consider the bridge to be necessary. Additionally, Chester, in its own Exceptions, made no mention that it is considering closing the bridge. Accordingly, the County's Exception No. 5 is denied.

Conclusion

We have carefully reviewed the record as developed in this proceeding, including the ALJ's Recommended Decision and the Exceptions filed thereto. Premised on our review, we conclude that the Parties' Exceptions to the Recommended Decision are not meritorious, and, as a result, they will be

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[3] On April 27, 2000, Conrail filed a Motion to Strike Exhibit "A" to the Exceptions of the County, pursuant to Sections 5.103 and 5.402 of our Regulations, 52 Pa. Code §§ 5.103 and 5.402, based upon the fact that the County received notice of the proceedings herein, and chose not to participate. Based upon our ruling on the County's Exceptions, Conrail's Motion to Strike is, in essence, granted.

denied. Accordingly, the ALJ's Recommended Decision will be adopted as the action of the Commission; THEREFORE,

IT IS ORDERED:

1. That the Exceptions filed by the City of Chester, on April 14, 2000, to the Recommended Decision of Administrative Law Judge Herbert Smolen herein are denied, consistent with this Opinion and Order.

2. That the Exceptions filed by the National Railroad Passenger Corporation, on April 14, 2000, to the Recommended Decision of Administrative Law Judge Herbert Smolen herein are denied, consistent with this Opinion and Order.

3. That the Exceptions filed by Consolidated Rail Corporation, on April 17, 2000, to the Recommended Decision of Administrative Law Judge Herbert Smolen herein are denied, consistent with this Opinion and Order.

4. That the Exceptions filed by the Pennsylvania Department of Transportation, on April 17, 2000, to the Recommended Decision of Administrative Law Judge Herbert Smolen herein are denied, consistent with this Opinion and Order.

5. That the Exceptions filed by the County of Delaware, on April 17, 2000, to the Recommended Decision of Administrative Law Judge Herbert Smolen herein are denied, consistent with this Opinion and Order.

6. That the Recommended Decision of Administrative Law Judge Herbert Smolen issued herein on March 14, 2000, is hereby adopted as the action of the Commission, consistent with this Opinion and Order.

7. That the City of Chester, at its initial cost and expense, furnish all material and perform all work necessary to maintain the substructure, superstructure and deck of the Lloyd Street rail-highway bridge crossing; all in a safe and satisfactory condition.

8. That the Consolidated Rail Corporation, the County of Delaware, and the Pennsylvania Department of Transportation shall reimburse the City of Chester in an amount equal to twenty-five percent (25%) of the costs incurred by the City of Chester in maintaining the substructure, superstructure, and deck of the bridge, exclusive of the wearing surface, curbs, and sidewalks on the bridge, in the following proportions:

(a) Consolidated Rail Corporation - 15%

(b) The County of Delaware - 5%

(c) Pennsylvania Department of Transportation - 5%

9. That the City of Chester bear all of the remaining costs incurred in furnishing material and performing work in accordance with Ordering Paragraph No. 7 hereof.

10. That the City of Chester, at its sole cost and expense, furnish all material and perform all work necessary:

(a) to maintain the curbs and sidewalks and wearing surface of the bridge;

(b) to maintain the highway approaches to the bridge, including the wearing surface and the curbs and sidewalks thereon; and

(c) to remove snow, ice and debris from all of the areas listed in (a) and (b) above provided, however, that nothing contained herein shall prohibit the City of Chester or the County of Delaware from enforcing any applicable laws and/or ordinances pertaining thereto.

11. That the City of Chester, at its sole costs and expense, within 120 days from the date of entry of this Opinion and Order, perform an in-depth inspection of the entire structure and prepare and submit to our Bureau of Transportation and Safety, and to all Parties hereto, a detailed in-depth inspection report which shall include, *inter alia*, a structural analysis of the bridge, its load-carrying capacity, what maintenance work the City of Chester has performed since the date of entry of the instant Opinion and Order, any changes in the condition of the bridge, which would affect the safety and well being of the travelling public, any specific recommendations as to what additional repairs and/or work should be performed and when same will be done, together with the status of its efforts to secure funding for bridge replacement. In addition to the foregoing, the City of Chester, at its sole cost and expense, shall perform an in-depth inspection of the structure at least once every year thereafter and shall submit to the Com-mission and the Parties a detailed in-depth inspection report setting forth therein the foregoing items of information.

12. That the City of Chester, at least fifteen (15) days prior to the start of each inspection and/or maintenance work, shall notify all interested Parties of the actual date on which each such inspection and/or work shall begin.

13. That the Consolidated Rail Corporation, at its initial cost and expense, provide watchmen and flagmen, if necessary, and any and all other protection necessary for all rail operations, including those of Conrail, Amtrak, and SEPTA, during performance of the maintenance and inspection work ordered in Ordering Paragraphs 7, 10, and 11 hereof.

14. That the City of Chester, the County of Delaware, and the Pennsylvania Department of Transportation shall reimburse the Consolidated Rail Corporation for 85% of the costs incurred by Conrail in complying with Ordering Paragraph 13, in the following proportions:

(a) City of Chester - 75%

(b) The County of Delaware - 5%

(c) Pennsylvania Department of Transportation - 5%

15. That the Consolidated Rail Corporation bear all of the remaining costs incurred in supplying materials and performing work in accordance with Ordering Paragraph No. 13 hereof.

16. That in complying with the provisions of this Opinion and Order, all Parties shall cooperate and coordinate their respective duties.

17. That the National Railroad Passenger Corporation, the Southeastern Pennsylvania Transportation Authority, and the Consolidated Rail Corporation, each respectively, at their respective sole cost and expense, furnish all material and perform all work necessary to maintain their facilities, property and attachments to the bridge, if any, at the crossing, and the approaches thereto; all in a safe, satisfactory, and fully operational condition.

18. That each non-carrier utility, at their respective sole cost and expense, furnish all material and perform all work necessary to maintain their respective facilities and property, if any, at the crossing and the approaches thereto; all in a safe and satisfactory condition.

19. That this Opinion and Order, insofar as it places costs on various Parties in this proceeding, is without prejudice to the rights of such Parties to recover said costs from others in accordance with any lawful agreements.

20. That this Opinion and Order is binding upon the Parties hereto, their respective successors and assigns.

BY THE COMMISSION,

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: August 31, 2000

ORDER ENTERED: September 1, 2000

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed Jan. 18, 1996]

CIVIL ACTION No. 95-CV-4500

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, 1234 Market Street Philadelphia, PA 19107
Plaintiff,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. Box 3265 North Office Building Harrisburg, PA 17120
Defendant.

CONSENT DECREE

WHEREAS, this action was initiated by plaintiff, Southeastern Pennsylvania Transportation Authority ("SEPTA") because of the failure of the defendant, the Pennsylvania Public Utility Commission ("the Commission") to apply SEPTA's exemption under 49 U.S.C. §§ 24301(1) and 24501 (g), from Commission orders to inspect and maintain highway bridges over SEPTA rail lines, to the Woodland Avenue Bridge near 47th Street in Philadelphia in a PUC proceeding involving that bridge, at Commission docket I-870064; and

WHEREAS, the Commission has not acted to initiate or reopen proceedings involving other highway bridges over SEPTA railroad lines in order to reassign to other parties what appears to have been, prior to the enactment of the above-referenced statutory exemption, SEPTA's inspection and maintenance responsibilities f or such bridges (or parts thereof); and

WHEREAS, SEPTA has a continuing program of annual inspections of all structures, including all Highway Bridges (as that term is hereafter defined), over its railroad rights-of-way, and such inspections include visual inspections of the surface the Highway Bridges; and

WHEREAS, none of the Highway Bridges (as that term is hereafter defined) is the subject of any on-going design, construction or reconstruction which might be affected by this Consent Decree; and

WHEREAS, SEPTA does not now perform snow and ice removal from the surface of any Highway Bridge (as that term is hereafter defined), and is not required by any Commission order to do so, and any snow and ice removal from the Highway Bridges is performed by other entities, and such practice will not be affected by this Consent Decree; and

WHEREAS, the Commission recognizes and accepts SEPTA's statutory exemption from the future costs and responsibility associated with the design, construction, reconstruction, inspection, maintenance, snow, ice, debris or graffiti removal or repair of all highway bridges over railroad rights-of-way owned or operated upon by SEPTA ("Highway Bridges"), at railroad/highway crossings over which the PUC now has or may have jurisdiction; and

WHEREAS the Commission has procedures available for addressing emergencies, set forth at 52 Pa. Code sections 3.1 through 3.11, which in practice permit the Commission's issuance of an emergency (ex parte) order in any appropriate circumstances and as soon as practical, by a written order, requiring any entity under its jurisdiction, to perform or refrain from performing any action in order to fully remediate a clear and present danger to the public; and

WHEREAS, the Commission at all railroad/highway crossings under its jurisdiction, has jurisdiction over not only any railroad(s) but also any state or municipal entities

responsible for the highway(s) at and in the immediate vicinity of the crossings, including crossings where a Highway Bridge (as that term is subsequently defined in this Consent Decree) is located, and in an emergency, the Commission has the power to issue an emergency order requiring any parties under its jurisdiction to take any action (s) or forebear from any action(s) as necessary to remediate a clear and present danger.

NOW, THEREFORE, the Commission and SEPTA, intending to be legally bound, stipulate and agree as follows:

1. Under 49 U.S.C. §§24301(1) and 24501(g), the Commission is barred hereafter from assessing or continuing to assess upon SEPTA the cost or responsibility of or for design, construction, reconstruction, inspection, maintenance, removal of snow, ice, debris or graffiti, or repair ("Assessed Cost or Responsibility") of any Highway Bridge (further defined for this Consent Decree to also include all components, including without limitation, approaches, substructures and superstructures, highway decking, as well as railings, walls, fences and shielding of any kind, and stairways and ramps attached to the bridge (except where expressly accepted by SEPTA, either in writing to the Commission or on the record of a Commission proceeding, as a necessary part of an adjacent SEPTA-owned railroad station), and all lighting, drainage and highway signage). The term "Highway Bridge" shall not include any railroad catenary attachment on a Highway Bridge, and shall not include any railroad facilities beneath a Highway Bridge.

2. SEPTA is relieved by the above-referenced federal law from any further obligations under all prior orders of the Commission (which is defined to also include its predecessor, the Pennsylvania Public Service Commission) assigning to SEPTA any Assessed Cost or Responsibility for any Highways Bridges at any above-grade crossings under the Commission's jurisdiction.

3. Unless permitted by subsequent amendment to, or repeal of, the above referenced federal law, henceforth in all PUC above-grade crossing proceedings involving SEPTA railroad operations or SEPTA railroad rights-of-way, whether such proceedings are initiated by the Commission, SEPTA or by any other party, the Commission shall not assign to SEPTA, either on a temporary or on a permanent basis, any Assessed Cost or Responsibility in violation of SEPTA's statutory exemption with respect to Highway Bridges as set forth in paragraph no. 1 of this Consent Decree.

4. The Commission shall initiate or reopen proceedings regarding any above-grade crossing under its jurisdiction where, under the most recent relevant Commission order, SEPTA or a predecessor to SEPTA's title to the railroad right-of-way was made permanently responsible for the inspection and/or maintenance of any Highway Bridge or any portion thereof at such crossing, and the purpose of such PUC proceedings shall be, or shall include, the reassignment of SEPTA's prior Assessed Cost or Responsibility for such Highway Bridge to a party or parties other than SEPTA, as the Commission may determine.

5. The Commission and SEPTA acknowledge that the Commission's records of all railroad/highway crossings under its jurisdiction do not include a reference list describing all crossings where SEPTA has been assigned any Assessed Cost or Responsibility for Highway Bridges. In order to assist the Commission to begin its process of reassigning each such Assessed Cost or Responsibility to other parties, SEPTA has provided to the Commission a full and complete copy of SEPTA's 1995 bridge list.

6. The Bridge List's coded references as to which party or parties has been assigned maintenance responsibilities for each particular bridge are not necessarily accurate or complete, and SEPTA and the Commission agree that the dispositive document, in regard to the identity of Highway

Bridges or the current obligations of parties with respect to any Highway Bridge, is the most recent relevant Commission order. The Commission shall review its own records to determine what specific Assessed Cost or Responsibility had previously been assigned to SEPTA for any Highway Bridge, and pursuant to paragraphs nos. 1-3 above, must be reassigned by the Commission to other parties.

7. The Bridge List and its codes and a preliminary review by the Commission of its records identify the following Highway Bridges as bridges now in need of Commission action either to reassign SEPTA's Assessed Costs and Responsibilities or to assign maintenance responsibilities (where Commission records do not indicate which party or parties bear current maintenance responsibilities):

Bridge	SEPTA Railroad Right-of-Way	Bridge List Page
Union Avenue	SEPTA Mainline	6
Church Road	SEPTA Mainline	6
Greenwood Avenue	SEPTA Mainline	6
Bridge Street	Lansdale	8
Old York Road	Neshaminy (W. Trenton)	16
Old Street Road	Neshaminy (W. Trenton)	17
Wissahickon Avenue	Chestnut Hill West	28
School Lane	Chestnut Hill West	28
Allen Lane	Chestnut Hill West	29
City Avenue	Ivy Ridge	31
Woodland Avenue (near 47th Streeet)	Media-West Chester	33
Providence Road	Media-West Chester	36
Indian Lane	Media-West Chester	36
Eachus Road/Twp. 603	Media-West Chester	39
TR 153 / SR 4013	Bethlehem	46
Rockhill Road	Bethlehem	46
Sterling Street	Newtown	50
South Union Street	Octoraro	57
Sunnyside Road	Octoraro	58

8. Within sixty (60) calendar days after the Court approves this Consent Decree, the Commission shall take all action necessary to initiate Commission proceedings for each of the bridges identified in paragraph 7, either to reassign SEPTA's Assessed Costs and Responsibilities to parties other than SEPTA, or where Commission records do not indicate which party or parties bear current maintenance responsibilities, to assign such responsibilities to parties other than SEPTA. As part of its initial action within sixty (60) calendar days after the Court approves this Consent Decree, the Commission shall reassign (or assign) SEPTA's Assessed Costs and Responsibilities to parties other than SEPTA on at least a temporary basis.

9. As soon as possible thereafter, the Commission shall enter orders permanently reassigning SEPTA's Assessed Costs and Responsibilities, or (where Commission records do not indicate which party or parties bear current maintenance responsibilities) permanently assigning such responsibilities for each Highway Bridge listed in paragraph 7, to a party or parties other than SEPTA. Such orders shall be consistent with the scope of SEPTA's statutory exemption from taxes and fees, as referred to in paragraphs nos. 1-3 of this Consent Decree. The Commission's obligations to proceed under the schedule set forth in paragraph 8 do not apply to the Rockhill road bridge which is currently closed to all traffic, both motor vehicle and pedestrian, by barricades erected and maintained by the Township of East Rockhill, pending reconstruction of the bridge. The existing bridge (including its reconstruction) is the subject of a current Commission proceeding assigned to a Commission administrative law judge. If within one year of the approval of the Consent Decree the existing bridge has not been removed and the administrative law judge has issued no recommended decision reassigning SEPTA's Assessed Cost or Responsibility for (the maintenance of) the existing bridge to a party or parties other than SEPTA, the commission shall immediately act to reassign such bridge

maintenance responsibilities to a party or parties other than SEPTA, at least on an interim basis. If prior to the removal of the bridge, SEPTA, through its annual inspection or otherwise, learns of any problem with the Rockhill Road bridge that presents a clear and present danger, SEPTA shall notify the Commission, and the Commission, upon learning such information from SEPTA or from any other source, shall act under its emergency procedures or otherwise, immediately to order a party or party other than SEPTA to immediately remediate the problem with the bridge, by removal or otherwise, consistent with the terms of paragraph 11 below, as those terms relate to both the Commission and SEPTA.

10. If it is brought to the attention of the Commission by SEPTA (by notice under paragraph no. 13 below) or by any other source of information that SEPTA may have also been assigned any Assessed Costs and Responsibilities for any other Highway Bridges under the Commission's jurisdiction in addition to the Highway Bridges identified in this Consent Decree, the Commission shall (a) immediately notify SEPTA as provided in paragraph no. 13 below, and (b) within sixty (60) calendar days take all actions necessary to reassign such Assessed Costs and Responsibilities at least on a temporary basis, and shall promptly thereafter proceed to make a permanent reassignment of such Costs and Responsibilities.

11. In the interval between the Court's approval of this Consent Decree and the Commission's assignment(s) of temporary maintenance responsibility as required by paragraph no. 8 of this Consent Decree (hereinafter, "the interval"), SEPTA shall continue its pattern of annual inspections of all structures over its rights-of-ways, including the Highway Bridges referenced in paragraph no. 7 of this Consent Decree, and such inspections shall also include a visual inspection of the surface of such Highway Bridges (i.e., both the cartway and any footway on each Bridge). In the interval, if SEPTA learns, either through any of its

continuing annual inspections or from any other source that a condition develops involving any part(s) of these Highway Bridges that presents a clear and present danger to the public (either those using the Highway Bridge or the railroad beneath), SEPTA shall immediately contact the Commission and request that the Commission, using its emergency procedures or otherwise, immediately assign an entity under its jurisdiction (at the site of the Highway Bridge) with the duty to take such action(s) as to remediate the danger, including erecting barricades and signage, and/or making repairs (and such other action as the Commission shall determine), involving the Highway Bridge. If in the interval the Commission learns, either through a communication from SEPTA or from any other source, that a condition has developed with any part(s) of these Highway Bridges that presents a clear and present danger to the public (either those using the Highway Bridge or the railroad beneath), the Commission shall immediately act, either through its emergency procedures or otherwise, to require a party or party (other than SEPTA) under its jurisdiction at the site of the Highway Bridge, to take any necessary actions to remediate the danger, such as erection of barricades, signage, and repairs (and/or such other actions as the Commission may require) to and at the site of the Highway Bridge. To whatever extent necessary, SEPTA shall cooperate by allowing reasonable access to its railroad right-of-way in order that any such repairs can be carried out. If, by the nature of the work involved in the repair, the work of the repair (or any work or other action related to the repair), must be carried out by SEPTA, the Commission shall require SEPTA to do such work or other action, and direct that SEPTA's costs and expenses shall be subsequently reimbursed to SEPTA by another (or other) party(ies), as the Commission then or thereafter shall determine.

12. SEPTA shall cooperate with the Commission during all proceedings initiated by the Commission under this Consent

Order, by providing to the Commission any relevant information SEPTA may have concerning the crossings involved in the proceedings.

13. All notices required between the Commission and SEPTA under the terms of this Consent Decree shall be by certified U.S. mail, return receipt requested, to the following:

Public Utility Commission:

Chief Counsel
Pa. Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17120

SEPTA:

both of two:

General Counsel,
SEPTA
1234 Market Street
Fifth Floor
Philadelphia, PA 19107

and:

Chief Engineer,
SEPTA
1234 Market Street
13th Floor
Philadelphia, PA 19107

The notice requirements established by this Consent Decree shall not replace, but shall supplement, any notice procedures of the Commission in regards to all Commission procedures initiated by the Commission (or any other party) as a result of Commission compliance (or, when initiated by any other party, which provides the Commission with an opportunity to comply) with this Consent Decree.

14. The Commission and SEPTA agree that they will jointly submit this Consent Decree to the United States District Court for the Eastern District of Pennsylvania for approval. If the Court approves the Consent Decree, it shall operate as an Order of the Court. If the Court does not approve the Consent Decree, the Consent Decree will be null and void, and the litigation will proceed.

15. This Court shall retain jurisdiction over this action to enforce the provisions of this Consent Decree, including any claims of SEPTA arising out of the Commission's failure to comply with SEPTA's federal statutory exemption. Notwithstanding paragraph 16 below, SEPTA reserves the right to seek attorney fees and costs, and any other appropriate remedies in the event of any action by SEPTA to enforce the provisions of this Consent Decree.

16. SEPTA covenants and agrees that it shall not seek to recover its attorney fees and costs in this action, in regards to fees and costs leading up to and including this Consent Decree. The PUC covenants and agrees that it will not oppose SEPTA's withdrawal of a certain Petition for Review filed on July 21, 1995 by SEPTA at the Pennsylvania Commonwealth Court (at Docket No. 1845 C.D. 1995). The PUC further covenants and agrees not to seek attorney fees and costs in regards to such SEPTA petition and SEPTA's withdrawal of such Petition. SEPTA shall withdraw such Petition for Review within ten (10) business days of the Court's approval of the Consent Decree.

For the defendant:

/s/ Bohdan R. Pankiw
BOHDAN R. PANKIW, Esquire
Attorney I.D. No. 24825
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. Box 3265
Harrisburg, PA 17120
(717) 783-3190

/s/ John F. Povilaitis
JOHN F. POVILAITIS
Attorney I.D. No. 28944
Chief Counsel
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. Box 3265
Harrisburg, PA 17120
(717) 783-3190

For the plaintiff:

/s/ Vincent J. Walsh Jr.
VINCENT J. WALSH, JR., Esquire
Attorney I.D. No. 28694
SEPTA Legal Department
1234 Market Street
Fifth Floor
Philadelphia, PA 19107
(215) 580-7459

DAVID P. BRUTON, Esquire
Attorney I.D. No. 03803
1100 PNB Building
Philadelphia, PA 19107
(215) 988-2711

/s/ Jan E. DuBois
JAN E. DUBOIS
Honorable Jan E. DuBois, J.
1/19/96

APPENDIX F

UNITED STATES CODE SERVICE

TITLE 49. TRANSPORTATION
SUBTITLE V. RAIL PROGRAMS
PART C. PASSENGER TRANSPORTATION
CHAPTER 243. AMTRAK

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49 USCS § 24301 (2001)

§ 24301. Status and applicable laws

(a) Status. Amtrak—

(1) is a railroad carrier under section 20102(2) and chapters 261 and 281 of this title [49 USCS §§ 26101 *et seq.* and 28101 *et seq.*];

(2) shall be operated and managed as a for-profit corporation; and

(3) is not a department, agency, or instrumentality of the United States Government, and shall not be subject to title 31.

(b) Principal office and place of business. The principal office and place of business of Amtrak are in the District of Columbia. Amtrak is qualified to do business in each State in which Amtrak carries out an activity authorized under this part [49 USCS §§ 24101 *et seq.*]. Amtrak shall accept service of process by certified mail addressed to the secretary of Amtrak at its principal office and place of business. Amtrak is a citizen only of the District of Columbia when deciding original jurisdiction of the district courts of the United States in a civil action.

(c) Application of Subtitle IV. Subtitle IV of this title [49 USCS §§ 10101 *et seq.*] shall not apply to Amtrak, except for sections 11301, 11322(a), 11502, and 11706. Notwithstand-

ing the preceding sentence, Amtrak shall continue to be considered an employer under the Railroad Retirement Act of 1974, the Railroad Unemployment Insurance Act, and the Railroad Retirement Tax Act.

(d) Application of safety and employee relations laws and regulations. Laws and regulations governing safety, employee representation for collective bargaining purposes, the handling of disputes between carriers and employees, employee retirement, annuity, and unemployment systems, and other dealings with employees that apply to a rail carrier subject to part A of subtitle IV of this title [49 USCS §§ 10101 *et seq.*] apply to Amtrak.

(e) Application of certain additional laws. Section 552 of title 5, this part [49 USCS §§ 24101 *et seq.*], and, to the extent consistent with this part [49 USCS §§ 24101 *et seq.*], the District of Columbia Business Corporation Act (D.C. Code § 29-301 *et seq.*) apply to Amtrak. Section 552 of title 5, United States Code, applies to Amtrak for any fiscal year in which Amtrak receives a Federal subsidy.

(f) Tax exemption for certain commuter authorities. A commuter authority that was eligible to make a contract with Amtrak Commuter to provide commuter rail passenger transportation but which decided to provide its own rail passenger transportation beginning January 1, 1983, is exempt, effective October 1, 1981, from paying a tax or fee to the same extent Amtrak is exempt.

(g) Nonapplication of rate, route, and service laws. A State or other law related to rates, routes, or service does not apply to Amtrak in connection with rail passenger transportation.

(h) Nonapplication of pay period laws. A State or local law related to pay periods or days for payment of employees does not apply to Amtrak. Except when otherwise provided under a collective bargaining agreement, an employee of Amtrak shall be paid at least as frequently as the employee was paid on October 1, 1979.

(i) Preemption related to employee work requirements. A State may not adopt or continue in force a law, rule, regulation, order, or standard requiring Amtrak to employ a specified number of individuals to perform a particular task, function, or operation.

(j) Nonapplication of laws on joint use or operation of facilities and equipment. Prohibitions of law applicable to an agreement for the joint use or operation of facilities and equipment necessary to provide quick and efficient rail passenger transportation do not apply to a person making an agreement with Amtrak to the extent necessary to allow the person to make and carry out obligations under the agreement.

(k) Exemption from additional taxes.

(1) In this subsection—

(A) "additional tax" means a tax or fee—

(i) on the acquisition, improvement, ownership, or operation of personal property by Amtrak; and

(ii) on real property, except a tax or fee on the acquisition of real property or on the value of real property not attributable to improvements made, or the operation of those improvements, by Amtrak.

(B) "Amtrak" includes a rail carrier subsidiary of Amtrak and a lessor or lessee of Amtrak or one of its rail carrier subsidiaries.

(2) Amtrak is not required to pay an additional tax because of an expenditure to acquire or improve real property, equipment, a facility, or right-of-way material or structures used in providing rail passenger transportation, even if that use is indirect.

(l) Exemption from taxes levied after September 30, 1981.

(1) In general. Amtrak, a rail carrier subsidiary of Amtrak, and any passenger or other customer of Amtrak or

such subsidiary, are exempt from a tax, fee, head charge, or other charge, imposed or levied by a State, political subdivision, or local taxing authority on Amtrak, a rail carrier subsidiary of Amtrak, or on persons traveling in intercity rail passenger transportation or on mail or express transportation provided by Amtrak or such a subsidiary, or on the carriage of such persons, mail, or express, or on the sale of any such transportation, or on the gross receipts derived therefrom after September 30, 1981. In the case of a tax or fee that Amtrak was required to pay as of September 10, 1982, Amtrak is not exempt from such tax or fee if it was assessed before April 1, 1997.

(2) The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this subsection and may grant equitable or declaratory relief requested by Amtrak.

(m) Waste disposal.

(1) An intercity rail passenger car manufactured after October 14, 1990, shall be built to provide for the discharge of human waste only at a servicing facility. Amtrak shall retrofit each of its intercity rail passenger cars that was manufactured after May 1, 1971, and before October 15, 1990, with a human waste disposal system that provides for the discharge of human waste only at a servicing facility. Subject to appropriations—

(A) the retrofit program shall be completed not later than October 15, 2001; and

(B) a car that does not provide for the discharge of human waste only at a servicing facility shall be removed from service after that date.

(2) Section 361 of the Public Health Service Act (42 U.S.C. 264) and other laws of the United States, States, and local governments do not apply to waste disposal from

rail carrier vehicles operated in intercity rail passenger transportation. The district courts of the United States have original jurisdiction over a civil action Amtrak brings to enforce this paragraph and may grant equitable or declaratory relief requested by Amtrak.

(n) Rail transportation treated equally. When authorizing transportation in the continental United States for an officer, employee, or member of the uniformed services of a department, agency, or instrumentality of the Government, the head of that department, agency, or instrumentality shall consider rail transportation (including transportation by extra-fare trains) the same as transportation by another authorized mode. The Administrator of General Services shall include Amtrak in the contract air program of the Administrator in markets in which transportation provided by Amtrak is competitive with other carriers on fares and total trip times.

HISTORY: (July 5, 1994, P.L. 103-272, § 1(e), 108 Stat. 904; Dec. 29, 1995, P.L. 104-88, Title III, Subtitle A, § 308(g), 109 Stat. 947; Dec. 2, 1997, P.L. 105-134, Title I, Subtitle A, §§ 106(b), 110(a), Title II, § 208, Title IV, §§ 401, 402, 415(d), 111 Stat. 2573, 2574, 2584, 2585, 2590.)

PENNSYLVANIA STATUTES

PENNSYLVANIA CONSOLIDATED STATUTES
TITLE 66. PUBLIC UTILITIES
PART I. PUBLIC UTILITY CODE
SUBPART D. SPECIAL PROVISIONS RELATING TO REGULATION OF PUBLIC UTILITIES
CHAPTER 27. RAILROADS

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66 Pa.C.S. § 2702 (2001)

§ 2702. Construction, relocation, suspension and abolition of crossings

(A) GENERAL RULE.—No public utility, engaged in the transportation of passengers or property, shall, without prior order of the commission, construct its facilities across the facilities of any other such public utility or across any highway at grade or above or below grade, or at the same or different levels; and no highway, without like order, shall be so constructed across the facilities of any such public utility, and, without like order, no such crossing heretofore or hereafter constructed shall be altered, relocated, suspended or abolished.

(B) ACQUISITION OF PROPERTY AND REGULATION OF CROSSING.—The commission is hereby vested with exclusive power to appropriate property for any such crossing, except as to such property as has been or may hereafter be condemned by the Department of Transportation for projects financed entirely by the Commonwealth and for Federal Aid Projects under section 1004 of the act of June 1, 1945 (P.L. 1242, No. 428), known as the "State Highway Law," in which case the provisions of that statute shall be in effect, and to determine and prescribe, by regulation or order, the points at which, and the manner in which, such crossing

may be constructed, altered, relocated, suspended or abolished, and the manner and conditions in or under which such crossings shall be maintained, operated, and protected to effectuate the prevention of accidents and the promotion of the safety of the public. The commission shall require every railroad the right-of-way of which crosses a public highway at grade to cut or otherwise control the growth of brush and weeds upon property owned by the railroad within 200 feet of such crossing on both sides and in both directions so as to insure proper visibility by motorists.

(C) MANDATORY RELOCATION, ALTERATION, SUSPENSION OR ABOLITION.—Upon its own motion or upon complaint, the commission shall have exclusive power after hearing, upon notice to all parties in interest, including the owners of adjacent property, to order any such crossing heretofore or hereafter constructed to be relocated or altered, or to be suspended or abolished upon such reasonable terms and conditions as shall be prescribed by the commission. In determining the plans and specifications for any such crossing, the commission may lay out, establish, and open such new highways as, in its opinion, may be necessary to connect such crossing with any existing highway, or make such crossing more available to public use; and may abandon or vacate such highways or portions of highways as, in the opinion of the commission, may be rendered unnecessary for public use by the construction, relocation, or abandonment of any of such crossings. The commission may order the work of construction, relocation, alteration, protection, suspension or abolition of any crossing aforesaid to be performed in whole or in part by any public utility or municipal corporation concerned or by the Commonwealth or an established nonprofit organization with a recreational or conservation purpose.

(D) PROCEDURE FOR APPROPRIATION OF PROPERTY.—When any real property is appropriated by the commission under this section, each parcel of such property so appropriated, shall be accurately described by metes and bounds, and the record owner of each such parcel shall be named in the order of appropriation. Unless otherwise recorded, the commission shall file with the recorder of deeds of the proper county, a copy of that portion of the order of the commission which appropriates such property, and such plans and other detailed information as the commission may deem necessary. Such portion of the commission's order dealing with the specific property appropriated shall be recorded and indexed under the name or names of the record owners of such specific property at the expense of the utility or utilities, political subdivision, municipality or municipalities, governmental agency, including the Department of Transportation and Public Utility Commission, corporation or persons upon whose instigation, petition or complaint the said crossing was constructed, reconstructed, relocated, altered, suspended or abolished, as may be ordered, to bear such expense or recording by the commission. When such appropriation of real property has been recorded under the provisions of any other statute, such recording shall not be duplicated under the terms of this subsection.

(E) REACTIVATION.—The commission may, within its discretion upon petition by any railroad, the Commonwealth, a political subdivision or any other affected party by order reactivate any crossing suspended under this section.

(F) DANGER TO SAFETY.—Upon the commission's finding of an immediate danger to the safety and welfare of the public at any such crossing, the commission shall order the crossing to be immediately altered, improved, or suspended. Thereafter hearing shall be held and costs shall be allocated in the manner prescribed in this part.

(G) SUSPENSIONS.—Any order of suspension under this section shall require the following for the protection of the motoring public:

(1) Removal or covering of crossing warning devices.

(2)(i) Paving over the tracks; or

(ii) removal of the tracks and paving over of the area formerly occupied by said tracks; or

(iii) barricading the crossing.

(H) ASSIGNMENT OF CROSSING RESPONSIBILITIES TO CERTAIN NONPROFIT ORGANIZATIONS.—

(1) The commission may order the work of abolition of any crossing in whole or in part, including any future obligations, to be performed by a municipal authority created to advance recreation or conservation purposes or a nonprofit organization with a recreation or conservation purpose if:

(i) the municipal authority or nonprofit organization provides adequate security for the work or demonstrates financial responsibility to the satisfaction of the commission; and

(ii) the commission does not order any Commonwealth agency to bear ancillary responsibility for the work of abolition of any crossing, or the cost associated with the work, without the prior written consent of the head of the Commonwealth agency.

(2) In accordance with the provisions of section 2704 (relating to compensation for damages occasioned by construction, relocation or abolition of crossings), the commission may order the municipal authority or nonprofit organization assuming responsibility for the abolition of the crossing to bear all or a portion of the costs associated with the work. This section shall not apply to any proceeding wherein the commission has issued a final order prior to the effective date of its enactment.

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CHAPTER 27. RAILROADS

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66 Pa.C.S. § 2704 (2001)

§ 2704. Compensation for damages occasioned by construction, relocation or abolition of crossings

(A) GENERAL RULE.—The compensation for damages which the owners of adjacent property taken, injured, or destroyed may sustain in the construction, relocation, alteration, protection, or abolition of any crossing under the provisions of this part, shall, after due notice and hearing, be ascertained and determined by the commission. Such compensation, as well as the cost of construction, relocation, alteration, protection, or abolition of such crossing, and of facilities at or adjacent to such crossing which are used in any kind of public utility service, shall be borne and paid, as provided in this section, by the public utilities, municipal corporations, municipal authority or nonprofit organization authorized under section 2702(h) (relating to construction, relocation, suspension and abolition of crossings) concerned, or by the Commonwealth, in such proper proportions as the commission may, after due notice and hearing, determine, unless such proportions are mutually agreed upon and paid by the interested parties.

(B) JUDICIAL REVIEW.—Any party to the proceeding dissatisfied with the determination of the commission may appeal therefrom, as provided by law, and for this purpose is

hereby authorized to sue the Commonwealth. The commission may, of its own motion, or upon application of any party in interest, submit to the court of common pleas of the county wherein the property affected is located, the determination of the amount of damages to any property owner due to such condemnation, for which purpose such court shall appoint viewers, from whose award of damages an appeal to said court shall lie on the part of any person or party aggrieved thereby, under the general law applicable to the appointment of viewers, for the ascertainment of damages due to the condemnation of private property for public use.

(C) PAYMENT OF COMPENSATION.—The amount of damages or compensation determined and awarded to be paid the owners of adjacent property by the Commonwealth shall, in each instance, be paid by the State Treasurer, on a warrant drawn by the State Treasurer, upon the presentation to that officer of a statement setting forth the amount determined to be paid as aforesaid, duly certified by the commission; such payment to be paid out of any funds specifically appropriated for the improvement of the roads or highways of this Commonwealth; and in case of a verdict and judgment thereon for the damages or compensation, recorded by any such adjacent property owners upon appeal, the same shall be paid out of any funds appropriated as aforesaid; and any court of common pleas hearing and determining such appeal is hereby authorized and empowered to issue a writ of mandamus to such commission and the State Treasurer, or either of them, as the case may require, for the payment of such judgment.

(D) RECOVERY OF COMPENSATION.—The commission shall have the right to recover, for and on behalf of the Commonwealth, by due process of law, as debts of like amount are now by law recoverable, from the public utility or municipal corporation concerned, in such amounts or proportions against each as may be determined by the

commission, as hereinbefore provided in this section, the amount of the damages or compensation awarded to the owners of adjacent property by the commission, or by the court, and the amounts so received shall be paid into the State Treasury, through the Department of Revenue, to the credit of the Motor License Fund.